(17,373.)

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

Wilberforce Sully, Trustee; Wilberforce Sully in his own right, Alfred B. Carhart, Mrs. Mary P. Myton and The Travelers' Insurance Company, Plaintiffs in Error,

versus

The American National Bank et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF APPELLANT, THE TRAVELERS' INSURANCE COMPANY, OF HARTFORD, CONNECTICUT.

PRELIMINARY STATEMENT.

The printed record in this cause is an abreviation of the transcript sent up from the Supreme Court of Tennessee, as appears from the stipulation of counsel found on page 142 of the printed record. By mistake, the assignments of error to the decree of

the Supreme Court of Tennessee, which were filed in that Court in support of the application for writ of error, were omitted from the printed record. To supply this omission the parties have made and entered into another stipulation to the effect that the omitted assignments of error may be printed with the briefs of counsel with like effect, as if the same had been printed in the printed record. This second stipulation of counsel and the assignments of error will be found printed in full in the appendix to this brief.

STATEMENT OF THE CASE.

The Carnegie Land Company was incorporated under the laws of the State of Virginia, on the 24th day of June, 1889, as a mining and manufacturing company. Its business and principal offices were in Washington county, Tennessee. The act of the Legislature of Tennessee, passed March 19th, 1877, being Chapter 31 of the Acts of 1877, prescribed the terms upon which foreign corporations might do business in the State of Tennessee. Among other things a foreign corporation was required to register its charter in the State of Tennessee. It is conceded that said Carnegie Land Company complied with this provision of the statute, so as to enable it to do business in the State of Tennessee, and did transact its business affairs at Johnson City in said State in compliance with the provisions of said Act.

Stipulation of Counsel page 142 *of the Printed Record.*

On the 27th day of November, 1899, the American National Bank and others claiming to be creditors of the Carnegie Land Company filed a general creditors bill in the Chancery Court of Washington County, Tennessee, against the said Carnegie Land Company, alleging its insolvency and seeking to wind it up as an

insolvent corporation. The bill also alleged that said Land Company had made an assignment of all of its property in Tennessee, without recognizing in the assignment the priority given to resident Tennessee creditors, by said Act of 1877, Chapter 31. The Travelers Insurance Company, Wilberforce Sully and A. B. Carhart were not named as Defendants to said Bill. Said Chancery Court took jurisdiction of the cause and sustained said bill as a general creditors bill and administered the affairs of said corporation and pronounced decrees adjudicating the rights and priorities of creditors. On May 28th, 1895, Wiberforce Sully, Trustee, and A. B. Carhart filed their original bill in said Court against said Land Company and others seeking to foreclose a mortgage on the property of said Company which was registered February 10th, 1893. This mortgage covered the entire property of the Land Company and recited on its face that it was made expressly subject and subordinate to a mortgage of the Travelers' Insurance Company, dated and registered on the 23rd day of November, 1891, and covering that portion of said Land Company's property, known as the Carnegie Hotel property. The Travelers' Insurance Company and the trustee named in said mortgage, of November 23rd, 1891, were made parties defendant to this bill and answered the same.

See Stipulation, pages 143, 144, *and* 145 *of the Printed Record, and see answer of the Travelers' Insurance Company and its Trustee, page* 31 *Printed Record.*

The Travelers' Insurance Company also filed its intervention as a creditor of said Land Company in said original cause of the American National Bank and others. *Printed Record page* 33.

This bill of Sully and Carhart and the original bill of the

American National Bank and others were consolidated and heard together. *Printed Record page* 143.

The final decree of the Chancellor was rendered September 3rd, 1896. *Printed Record page* 47.

This final decree pronounced judgments in favor of resident Tennessee creditors whose claims accrued prior to November 23rd, 1891, the date of the registration of the Travelers' Insurance Company's mortgage, amounting to $29,377.36. This decree also pronounced a judgment in favor of the Travelers' Insurance Company as non-resident creditor for the sum of $35.406.19. This decree further provided that out of the entire proceeds of the Land Company's property, including the Hotel property, mortgaged to the Travelers' Insurance Company, there should first be paid taxes, costs and counsel fees; and, second, all debts due to residents of Tennessee, which were contracted prior to November 23rd, 1891, the date of the Travelers' Insurance Company's mortgage; third, the remainder of the proceeds of the Carnegie Hotel property, mortgaged to the Travelers' Insurance Company should be applied on the mortgage debt of the Travelers' Insurance Company, thus postponing the mortgage debt of the Travelers' Insurance Company to the unsecured debts of the residents of Tennessee. *Printed Record page* 45.

On appeal from this decree, the Court of Chancery Appeals of the State of Tennessee pronounced a decree on September 15th, 1897, affirming the Chancellor's decree upon this point and giving the resident Tennessee creditors priority over the mortgage debt of the Travelers' Insurance Company. *Printed Record page* 84.

On the appeal to the Supreme Court of Tennessee from this decree of the Court of Chancery Appeals, the Supreme Court of

Tennessee, on November 19th, 1898, pronounced a decree affirming the Chancellor's decree and the decree of the Chancery Court of Appeals, upon this point and giving preference to the resident Tennessee general creditors over the mortgage debt of the Travelers' Insurance Company on the Hotel property. The contention in the Chancery Court and in the Court of Appeals and in the Supreme Court on behalf of the Travelers' Insurance Company and others was that the Act of 1877, Chapter 31, was unconstitutional, as being in violation of the Constitution of Tennessee, and also as being in violation of Article 4, Section 2 of the Constitution of the United States, and in violation of the 14th Amendment, Section 1 of the Constitution of the United States. All of said decrees were against that contention and hold that said Act of 1877 was not in violation of the Constitution of Tennessee, and was not in violation of the Constitution of the United States, and was a valid Act. *Printed Record page* 87.

The case is brought to this Court by Writ of Error to reverse the holding of the Supreme Court of Tennessee and to have said Act of 1877, Chapter 31 decreed invalid, as being in violation of the Constitution of the United States. The assignments of error of the Travelers' Insurance Company will be found in full in the appendix to this brief.

BRIEF.

I.

The contention which we shall make before this Court is that the decree of the Supreme Court of Tennessee, upholding said Act of 1877, Chapter 31 is erroneous, because said Act violates Section 1 of the 14th Amendment to the Constitution of the United States. The part of Section 1 of the 14th Amendment

upon which we rely to support our contention is as follows: "Nor shall any State deprive any person of life, liberty or *property without due process of law.*" The Act of 1877, Chapter 31 is entitled: "An Act to declare the terms on which foreign corporations organized for mining and manufacturing purposes may carry on their business and may purchase, hold and convey real and personal property in this State." Section 1 of the Act provides that such foreign corporations may carry on in this State the business authorized by their charters and do the things therein specified, upon the terms and conditions and in the manner and under limitations herein declared."

Section 2 of the Act provides that the corporation shall file a copy of its charter with the Secretary of State and then record an abstract of the charter in each county where the corporation proposes to carry on any business and to acquire any lands.

Section 3 is, "that such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdiction of the Courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by the law directed in the case of corporations created or organized under the laws of this State."

Section 4 provides "That such corporations may purchase, acquire and hold real estate in fee or any other interest less than fee, and personal property of every kind" * * * "And may sell, lease and convey said real estate as natural persons may do."

Section 5 provides "That the corporations and the property of all corporations coming under the provision of this Act shall be liable for all the debts, liabilities and engagements of the said corporations, to be enforced in the manner provided by law for the application of the property of natural persons to the payment

of their debts, engagements and contracts. Nevertheless creditors who may be *residents of this State* shall have *a priority in the distribution of assets, or subjection of the same*, or any part thereof, *to the payment of debts* over all simple contract creditors, being residents *of any other country or countries*, and also over *mortgage or judgment creditors*, for all debts, engagements and contracts which are made or owing by said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid and shall constitute a prior lien on the property on which they are or may be charges as against all debts which may be incurred subsequent to the date of their registration or rendition."

The stipulation of counsel admits that on the 23d of November, 1891, when the Travelers' Insurance Company loaned $30,000.00 in cash to the Carnegie Land Company and took a mortgage on the hotel property to secure the same, the said Land Company was a solvent and going concern. *Printed record, page* 144.

It is manifest that the mortgage or judgment creditors whose claims are postponed to resident creditors are non-resident judgment or mortgage creditors, and that the language "being residents of any other country or countries," qualifying simple contract creditors, was also intended to qualify "mortgage or judgment creditors." This is the portion of the Act which the Travelers' Insurance Company claims has the effect to take its property without due process of law. On November 23d, 1891, the Carnegie Land Company had the right to borrow the $30,000.00 from the Travelers' Insurance Company, and had the right to give a valid mortgage upon its property to secure the loan. The money loaned by the Travelers' Insurance Company went into the bus-

iness of the Land Company and must have been applied either to the payment of its debts or to the betterment of its plant.

This Act of 1877, chapter 31, was considered by this Court in the case of *Blake vs. McClung*, 172 U. S., *page* 239.

The unconstitutionality of the Act was complained of in that case by certain natural persons who were residents and *citizens* of other States, and also by a foreign corporation, The Hull Coal and Coke Company, which was a corporation under the laws of the State of Virginia. The first contention of said parties was that the Act of 1877 violated Section 2 of Article 4 of the Constitution of the United States, which reads as follows: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Upon that contention this Court held in favor of the natural persons who were non-residents and *citizens* of other States than Tennessee, and that said Act did violate this provision of the Constitution. *Ibid., page* 254.

But as to The Hull Coal and Coke Company, the foreign corporation, the Court held that such corporation was not a "citizen" within the meaning of Section 2 of Article 4 of the Constitution, and as to it, said Act did not violate Section 2 of Article 4 of the Constitution. Said corporation then invoked the protection of Section 1 of the 14th Amendment of the Constitution, which provides that no State shall deprive *any person* of property without due process of law, and this Court held that said foreign corporation was a "person" within the meaning of the 14th Amendment. The Court further held that The Hull Coal and Coke Company was not *deprived* of any property because it was a simple contract creditor and had no property interest in the assets of the foreign corporation. *Ibid., pages* 259 *and* 260.

In the case at bar the Travelers' Insurance Company is a foreign corporation and is not a "citizen," so as to enable it to

invoke the protection of Section 2, Article 4, of the Constitution; so also, if it was a simple contract creditor it could not invoke Section 1 of the 14th Amendment of the Constitution, because it was not to be deprived of any *property* without due process of law. But the Travelers' Insurance Company occupies a different position from The Hull Coal and Coke Company, in this, that it is not a simple contract creditor, but is a creditor holding a mortgage on the property of the Land Company. This mortgage is *property*, and the Act of 1877, Chapter 31, deprives the Travelers' Insurance Company of this property without due process of law.

As before shown, Section 4 of the Act of 1877 expressly authorized said Land Company to "sell, lease and convey such real estate as natural persons may do." This included the right to mortgage its real estate.

On November 23rd, 1891, while said Land Company was a solvent and going concern, and while it had express authority and right to make said mortgage, it borrowed from the Travelers' Insurance Company $30,000.00 in cash, at the city of Hartford in the State of Connecticut (Printed Record, p. 147), and, to secure the same, executed said mortgage of November 23rd, 1891, on the Hotel property alone, leaving the balance of its property unincumbered. This balance so left unincumbered was more than sufficient to pay all the claims of resident Tennessee creditors, accruing prior to November 23rd, 1891, amounting to $29,377.36. *Stipulation, page* 144.

The total value of the Land Company's assets was $66,123.31. *Ibid, page* 145.

Of this, the Hotel property furnished $25,000.00, leaving $41,123.31 with which to pay $29,377.36 to the resident Tennes-

see creditors, whose claims accrued prior to November 23rd, 1891.

The resident Tennessee creditors claim that, under Section 5 of said Act, they had a statutory lien on said property at the time said mortgage was made on November 23rd, 1891. Section 5 of the Act does not undertake to give the resident creditors a *lien* on the *property:* but only "a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts."

It is thus apparent from the terms of the Act itself that no lien was given to the resident creditors on the property of the Land Company: and whatever rights they have under the statute could not take effect until the time when a distribution of the assets in payment of debts should occur. The Hotel property was therefore clear of all lien on November 23rd, 1891, when the mortgage was made to the Travelers' Insurance Company.

The Supreme Court of Tennessee did not construe said Act to give a lien on the property of the Land Company at the time of the accrual of the resident creditors' debts, but construed the Act to mean that the valid mortgage lien of the Travelers' Insurance Company was displaced and lost by the subsequent and unforeseen accident of insolvency of the Land Company. In other words, the Court held that, under the 4th section of the Act, the Travelers' Insurance Company acquired a valid first mortgage lien on the Hotel property: and then, under the 5th section, this valid first mortgage lien was taken away by the accidental happening of an unforeseen contingency, not contracted for; and this was held to be due process of law.

This case must be distinguished from cases where a statute gives a lien to parties who have contributed to the betterment of

the "common pledge," such as the case of *Provident Institution vs. Jersey City*, 113 U. S., 506–516, where a lien for water rents was given: and the case of *Walston vs. Nevin*, 128 U. S., 578, where a lien was given for street assessments: and the case of *Norwood vs. Baker*, 172 U. S., 269–279, where it was held that an assessment for street improvement was not taking the owner's property without due process of law, provided the assessment did not exceed the benefits to the property; but if the assessment substantially exceeds the benefits, then, to the extent of such excess, it is taking the property without due process of law.

The Tennessee Act of 1877 is not limited to creditors whose claims accrued from benefits or betterments to the Land Company's property, but extends to all resident Tennessee creditors; and the effect of the Act is to take the property of the Travelers' Insurance Company and give it to other persons because they are residents of Tennessee, and not because they have benefitted the real estate on which the Insurance Company's mortgage rests.

In the case of *Norwood vs. Baker*, 172 U. S., 279, above referred to, it was held that an assessment for improvements in excess of benefits was, to the extent of the excess, a taking of the owner's property without due process. In the case at bar the whole assessment, so to speak, is in excess of the benefits, because the creditors to whom the State court gave the Insurance Company's property had conferred no benefits on the "common pledge," or on the public.

In *Missouri Pacific Railway vs. Nebraska*, 164 U. S., 403–417, the State Board of Transportation of Missouri made an order on the Railroad Company to allow private persons to build a grain elevator on its right of way, and claimed the authority to make this order under a statute of the State. The Supreme Court of

Missouri, in a mandamus proceeding brought to compel the Railroad Company to obey this order, held that the statute authorized the order. *Ibid*, p. 414.

It was held by this Court that this was taking the Railroad Company's property without due process of law.

A statute of Louisiana forbade any person to take out insurance on property in that State in any insurance company which had not complied with the laws of that State. Allgeyer insured cotton then in New Orleans in a New York company, which had not complied with the laws of Louisiana. The Supreme Court of Louisiana gave judgment for $3,000.00 against Allgeyer for the penalty of violating this statute. This Court held that this statute was not due process of law. *Allgeyer vs. Louisiana*, 165 U. S., 578--591.

It is not deemed necessary to enter into refinements upon the meaning of the words "due process of law," or to multiply authorities on the subject. In the cases cited, the whole question of due process of law has been fully considered, and the other cases on the question cited and commented upon.

We must come at last to the proposition, that the Act of 1877, as construed by the Supreme Court of Tennessee, takes from the Travelers' Insurance Company its property, lawfully acquired, and turns it over to a class of individuals, upon the accidental happening of an unforeseen contingency, solely because they are residents of Tennessee, and not because of any merit in their claims. It seems to be a plain case of depriving the Insurance Company of its property without due process of law.

II.

It may be claimed by adversary counsel that the Travelers' Insurance Company is not entitled in this Court to claim the

protection of Section 1 of the 14th Amendment to the Constitution, because it did not directly and distinctly rely upon and urge this point in the State Court.

In reply, we say:

1st. That the Supreme Court of Tennessee, in its decree of November 19th, 1898, distinctly adjudged that said Act of 1877 was not in contravention or violation of Section 1 of the 14th Amendment. *Printed Record*, p. 87. In *Kaukauna Co. vs. Green Bay, &c., Canal*, 142 U. S., 269, this Court held: that, although the inhibition of the Constitution was not distinctly put in issue by the pleadings, or directly passed upon in the opinion of the State Court, still this Court will consider the Constitutional question, if an adjudication of such was necessarily involved in the disposition of the case by the State Court.

The case at bar is stronger than that case, because the decree of the Supreme Court of Tennessee does show, as above indicated, that this question was directly and distinctly adjudicated by that Court.

2nd. Not only was this inhibition of Section 1 of the 14th Amendment passed upon by the Supreme Court of Tennessee, but it was also passed upon by the Court of Chancery Appeals. In its opinion, the Court of Chancery Appeals states that the Travelers' Insurance Company's assignments of error raise this question; (*Printed Record*, p. 65) and (on page 72) holds the Act of 1877 to be Constitutional, basing its opinion on former decisions of the Tennessee Supreme Court: and its decree adjudges this Act to be Constitutional. *Page 84.* It is true that the assignments of error of the Travelers' Insurance Company to the decree of the Chancery Court do, as printed in the Record (Page 92),

appear to rely alone on Section 2, Article 4 of the Constitution, and Section 1 of the 14th Amendment does not appear to be distinctly mentioned: but the opinion of the Court of Chancery Appeals shows that this section of the 14th Amendment was relied upon and the Court held against the Insurance Company's contention.

3rd. Moreover, Carhart & Sully claimed a lien on the Land Company's property under the mortgage of February 10th, 1893. They were non-resident "persons" claiming under a mortgage and were necessarily in the same class with the Insurance Company. Their assignments of error distinctly raised the questions of the Constitutionality of the Act of 1877, under Section 1 of the 14th Amendment. *Pages 123-4 and Page 86.*

The Insurance Company was before the Court of Chancery Appeals and the Supreme Court of Tennessee upon a broad appeal from a decree in Equity, which took up the whole case. *Page 52.*

If the Supreme Court of Tennessee had held the Act of 1877 Constitutional, upon the assignments of error of Carhart & Sully, this holding would, under the Tennessee practice, operate against the Insurance Company, and all other parties similarly situated, even if they had not assigned errors on that question.

Wood vs. Cooper, 2 Heiskell, 441.
Reynolds vs. Brandon, 3 " 598.
Carnes vs. Polk, 5 " 244.
Grubb vs. Browder, 11 " 299.
Parsons vs. Kinzer, 3 Lea, 352.
Butler vs. Kinzie, 6 Pickle, 32 & 383.

Under these decisions, the protection of Section 1 of the 14th Amendment having been claimed by Carhart & Sully, the Ten-

nessee Supreme Court would pass upon it for all parties similarly situated, including the Insurance Company. The claim of the Insurance Company was considered by said Supreme Court to be before it for adjudication and was passed upon accordingly.

This gives this Court jurisdiction.

Morrison vs. Watson, 154 U. S., 115.

4th. But this elaboration is unnecessary. There is no doubt about the fact that the Insurance Company was before the Court of Chancery Appeals and the Supreme Court upon a broad appeal and did claim the protection of Section 1 of the 14th Amendment: and both Courts denied the claim. The claim is now made again before this Court in the assignments of error appended to this brief.

T. S. WEBB, *Solicitor.*

H. H. CARR,
WEBB & McCLUNG,
Of Counsel.

APPENDIX.

IN THE SUPREME COURT OF TENNESSEE.

AMERICAN NATIONAL BANK ET AL

vs.

CARNEGIE LAND COMPANY ET AL,

AND

WILBERFORCE SULLY, TRUSTEE, ET AL

vs.

CARNEGIE LAND COMPANY ET AL.

CONSOLIDATED CAUSES.

ASSIGNMENTS OF ERROR.

The Travelers' Insurance Company, a private corporation, a resident of Connecticut, with its principal office in Hartford, by its Solicitors, feeling itself aggrevied by the findings and decree of the Supreme Court of Tennessee in the above entitled causes, assigns errors thereto, as follows:

I.

That the said Court erred in finding and holding that the Act passed by the General Assembly of Tennessee, on the 19th day of March, 1877, and approved on March 21, 1877, being Chapter 31 of the Laws of Tennessee of 1877, defining the terms upon which foreign corporations organized for mining and manufacturing purposes may carry on their business in Tennessee, and

especially Section 5 of said Act, was not in violation of Section 2, Article IV, of the Constitution of the United States, which provided that, "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and said Court erred in holding thereunder that Tennessee creditors were preferred, by virtue of said void Act, over appellant, as a citizen and resident of another State, in the distribution of the assets of defendant Company; that said Court should have held that as to appellant, as a resident and citizen of the State of Connecticut, the Act in question gave an unauthorized preference, privilege and immunity to residents and citizens of the State of Tennessee, by virtue alone of said residence and citizenship, the Act and Section thereof was unconstitutional and in violation of said clause of the Constitution of the United States as against said appellant, in this:

1. Appellants being the beneficiary under a Deed of Trust duly executed and delivered on certain real estate therein described to secure to them the repayment of a loan of thirty thousand dollars ($30,000.00), the said Deed of Trust having been executed at a time when the Carnegie Land Company was solvent, and there existing no legal impediment to the execution of said Deed of Trust, and the real estate embraced therein belonging to said Carnegie Land Company, and being free from any legal demand or claim in favor of any creditor of said Carnegie Land Company, the Court should have decreed in favor of appellants' right to subject the real estate embraced in said Deed of Trust to the satisfaction of its said debts.

2. Because said Court refused to recognize and uphold appellants' rights under said Deed of Trust until after the satisfaction of the debts created prior thereto in favor of citizens and residents of the State of Tennessee, was an adjudication without

authority of law and in violation of Section 2, Article IV, of the Constitution of the United States.

3. Appellant, by virtue of its said Deed of Trust, was entitled to have subjected to the payment of its debt the proceeds of the real estate embraced therein without being postponed to the rights of the creditors of the Carnegie Land Company, either residents or non-residents of the State of Tennessee, and the denial of this right in favor of appellant by said Supreme Court was without authority of law and in violation of Section 2, Article IV, of the Constitution of the United States.

4. The said Act of 1877, Section 5, does not impose upon the beneficiaries under trust deeds who are citizens and residents of Tennessee any such postponement of their rights as is sought to be imposed upon beneficiaries under deeds of trust who are citizens and residents of other States than Tennessee; the postponement of such non-resident creditors under their deeds of trust, contracts and engagements, to the rights of creditors who are citizens and residents of the State of Tennessee, and whose debts were created prior to the execution and registration of said trust deeds and engagements, places a burden upon and withholds a benefit from such non-resident creditors that is not placed nor withheld from the class of Tennessee creditors.

II.

That in the Chancery Court held in Johnson City, Washington County, Tennessee, being the court which had and exercised the original jurisdiction in the above entitled causes, the appellant herein specifically set up and claimed that it was entitled to the privileges and immunities guaranteed in Section 2, Article IV, of the Constitution of the United States, viz: "The citizens of each

State shall be entitled to all the privileges and immunities of the citizens of the several States;" and that it was deprived of such privileges and immunities by the Act of Tennessee, approved March 21, 1877, above referred to; and, also that its rights, privileges and immunities as a citizen of the United States were abridged by the provisions of the statutes of the General Assembly of Tennessee, approved March 21, 1877, above referred to, under the provisions of Section 1, Article XIV, of the Amendments of the Constitution of the United States, and that it was also deprived of its property and rights without the process of law by the enforcement of said invalid Act of said General Assembly of Tennessee, but the decision of said Chancery Court was against said rights, privileges and immunities so claimed by appellant; and the same rights, privileges and immunities so set up and claimed by appellant in said Chancery Court were again set forth and claimed by said appellant in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a suit of this kind could be had, and the decision of said Supreme Court was against appellant.

All of which is here assigned as error.

III.

That the said Supreme Court of Tennessee erred in finding and holding that the said Act of the General Assembly of Tennessee, passed March 19, 1877, and approved March 21, 1877, and being Chapter 31 of the Acts of 1877, and especially Section 5 thereof, which was enforced against appellant in the above entitled causes, was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides as follows:

"No State shall make or enforce any law which shall abridge "the privileges or immunities of citizens of the United States;

"nor shall any State deprive any person of life, liberty or proper-"ty, without due process of law; nor deny to any person within its jurisdiction "equal protection of its laws"; but said court should have held that said Act, and especially section 5 thereof, did abridge the rights and privileges of appellant as a citizen of the United States, and did deprive appellant, as mortgagee, of its property and rights, without due process of law, and deprived it of the equal protection of the laws, in this:

1. That said deed of trust was made by a solvent and going corporation, to-wit, the defendant Carnegie Land Company, authorized to make the same under the laws of Tennessee, and having the Constitutional right, as a solvent and going concern, to contract, as any other person or corporation within the State of Tennessee, which Constitutional right of the parties to said contract, to have the same enforced substantially as provided by the terms thereof, could not be taken away by statute, on the happening of a future event or winding up of the maker of said deed of trust, the Carnegie Land Company,—such arbitrary Statute destroying in this case, by its application, the ability and right of such a going concern to use and handle its property and contract with respect thereto as permitted to all other solvent holders and owners of such property within said State.

2. That said court should have held that said Act, and section 5 thereof, which was enforced against appellant, and through which Tennessee creditors were given priority over appellant in the distribution of the assets of Defendant Company, though claiming under a prior deed of trust, was in violation of said section 1 of Article XIV of the Constitution of the United States, and was not "due process of the law, because said Act, and section, was class legislation within the meaning of the law, in that the selection of the class subject to its provisions, to-wit, foreign

corporations permitted to do business as Tennessee corporations, in all respects, and whose engagements were by said Act to be enforced in the same manner as provided for natural persons, was not a natural but an arbitrary selection of class, without any reason, public or private, pointed out or to be otherwise seen, why these particular mining and manufacturing corporations more than any natural person or other domestic corporation, or other foreign corporation not organized for manufacturing or mining, as embraced in the Act, should be deprived of the Constitutional right of other solvent and going concerns, or persons, to own, use and contract with respect to their property within the State, as allowed to all other property owners, and why the creditors of such corporation should be required to take a deed of trust subject to the priority in favor of unknown debts and debtors theretofore contracted, in the event of subsequent insolvency, when creditors secured by deeds of trust of no natural person, domestic corporation, or other foreign corporation, except manufacturing and mining, are required to be so postponed and deprived of their ordinarily legally acquired rights. In enforcing said Act against appellant and not holding the same void, for the above reasons, and thereby depriving appellant of its property and rights, said Court erred.

3. The said Court erred in refusing to recognize appellant's right to share in the distribution of the assets of the Carnegie Land Company equally with corporations organized under the laws of Tennessee who were creditors of said Carnegie Land Company.

4. The Court erred in refusing to recognize appellant's right to share in the distribution of the assets of the Carnegie Land Company equally with corporations which were not organized under the laws of Tennessee, and which had not entered the State

under the provisions of the said Act of 1877, Chapter 31, of the laws of Tennessee, but were doing business in Tennessee under the general laws of Tennessee and under the laws of the United States, and whose debts were not secured by deeds of trust, mortgage or otherwise, and who were not entitled to priority over appellant, and in so holding said Supreme Court of Tennessee abridged the rights and privileges of appellant as a citizen of the United States.

5. If from any cause the Court found and so held that appellant's deed of trust was inoperative, unenforceable, and gave appellant no superior rights over the other creditors of the Carnegie Land Company, then said court should have held that the Act of 1877, Chapter 31, and especially Section 5 of said Act, was void, and that the appellant was entitled to share equally with all other creditors in the distribution of the assets of the Carnegie Land Company, which right to so share in the distribution of said assets was denied appellant on the ground that it was a non-resident of the State of Tennessee.

Wherefore, this appellant prays that this cause may be re-examined by the Supreme Court of the United States for writ of error for and on the errors assigned, and said findings and decree of the said Supreme Court of Tennessee may be reversed.

H. H. CARR,
WEBB & McCLUNG,
Solrs.

STIPULATION.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

UPON WRITS OF ERROR TO THE SUPREME COURT OF TENNESSEE.

WILBERFORCE SULLY ET. AL.
vs
AMERICAN NATIONAL BANK ET. AL.

WHEREAS, in the original stipulation of counsel as to record to be printed, pages 142-147 of printed record in the Supreme Court of the United States in the above cause, and under stipulation sixteenth thereof, on page 146, occurs this stipulation:

"16th. The assignments of error filed in the Supreme Court of Tennessee. Tr., vol. 6, pages 2025, 2038 and 2052, 2078." And,

WHEREAS, it was intended by this stipulation to have printed, especially, the assignments of error of appellant's filed in the Supreme Court of Tennessee from the decree and judgment of that Court to the United States; and,

WHEREAS, the pageing under said stipulation sixteenth calls for only the assignments of error filed in the Supreme Court of Tennessee, from the decree of the Court of Chancery Appeals of Tennessee, instead of the assignments of error above set out, by mistake of counsel.

Therefore, in order that the matter may be corrected without additional expense in the printing of the record, it is hereby agreed on the part of counsel representing parties in the above cause that the assignments of error filed by appellants on January 20th, 1899, and found at page 2110, 2116 and 2118, 2120 and 2121, 2126, of volume 6 of the record in the above cause, now filed in the Supreme Court of the United States, may be printed in the Briefs of counsel as provided by rule 21 of the Supreme Court of the United States, together with this stipulation, and when so printed, will be taken as a part of the record in the cause, and in full compliance with Rule 21 of the Supreme Court of the United States.

E. C. REEVES, Sol. for Creditors.

S. C. WILLIAMS, Sol. for Robert Burrow.

ISAAC HARR, Sol. for K.

DEADERICK & EPPS, Sol. for Am. Natt. Bank et. al.

E. J. BAXTER, Sol.

SAMUEL M. ARNELL, Sol.

THAD. A. COX, Sol. for Kirkpatrick, Williams & Bowman, by Jno. H. Bowman member of the firm.

HENRY HUDSON.

WEBB & McCLUNG, H. H. CARR, Sols. for Tavelers' Insurance Co.

SHIELDS & MOUNTCASTLE, Sols. for Carhart, Myton, Sully and others.

WILBERFORCE SULLY,
TRUSTEE, ET AL.,
vs.
THE AMERICAN
NATIONAL BANK, ET AL.

UNITED STATES
SUPREME COURT.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR APPELLANTS WILBERFORCE SULLY, in his own right as assignee of E. C. Manning, and A. B. CARHART, AND MRS. MYTON, WHO ARE GENERAL CREDITORS OF DEFENDANT CARNEGIE LAND COMPANY.

STATEMENT OF THE CASE.

I.

This writ of error is to review the decree of the Supreme Court of Tennessee pronounced in the cause of American National Bank et al. vs. Carnegie Land Company et al., sustaining the constitutionality of a Tennessee statute, passed March 19, 1877, and approved March 21, 1877, being Chapter 31 of Acts of 1877, and especially Section 5 thereof, which is in its important part, as follows:

"Sec. 5. Be it enacted that the corporations and the property of all corporations coming under the provisions of this Act, shall be liable for all the debts, liabilities, and

engagements of the said corporation, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

The caption of said act is "An Act to declare the terms on which foreign corporations organized for mining and manufacturing purposes may carry on their business, and purchase, hold and convey real and personal property in this State."

The first section of the Act provides:

"That corporations chartered or organized under the laws of other States or countries, for the purpose of mining ores or coals, or of quarrying stones or minerals, or transporting the same, or erecting, purchasing or carrying on works for the manufacture of metals, or of any articles made of or from metals, timber, cotton or wool, or of building dwelling houses for their workmen and others, or gas works, or water works, or other appliances designed for the promotion of

health, good order, or general utility, in connection with such mines, manufactories and dwelling houses, may become incorporated in this State, and may carry on in this State the business authorized by their respective charters, or the articles under which they are or may be organized, and may enjoy the rights and to do the things therein specified, upon the terms and conditions, and in the manner and under the limitations herein declared."

Section 2 is as follows:

"That each and every corporation created or organized under or by virtue of any government other than that of this State, of the character named in the first section of this Act, desiring to carry on its business in the State must first file in the office of the Secretary of State, a copy of its charter or articles of association, and must cause an abstract of the same to be recorded in the office of the Register of each county in which said corporation proposes to carry on its business or to acquire any lands."

Section 3 provides:

"That such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdiction of the Courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this State."

Section 4 provides that:

"Such corporations may purchase, acquire and hold real estate in fee, or any other interest less than the fee, and personal property of every kind, as they may deem necessary or suitable for the carrying on of the business specified in their

said charters or articles of association, filed as aforesaid with the Secretary of State, and may sell, lease, and convey such real estate as natural persons may do. And the State of Tennessee does hereby release its right of escheat by virtue of the alien origin of such corporations, or the alienage or non-residence of the shareholders of such corporation, or any of them."

The defendants American National Bank et al., on the 27th day of November, 1893, filed a general creditors bill against the Carnegie Land Company, a foreign corporation organized under the laws of the State of Virginia, and having complied with the Statute of Tennessee above set out, and subject to the provisions of the same, if valid.

This bill was filed in the Chancery Court of Washington County, Tennessee, alleging insolvency, failure to meet its obligations, and the fact that it had made a general assignment of all its property in Tennessee, without recognizing in said assignment the preference given to resident Tennessee creditors by said Act of 1877, chapter 31; and, also, said bill sought the appointment of a receiver and the administration of the assets of said company as an insolvent corporation.

See Orig. Bill, tr. pp. 1 et seq.
See stipulations, tr. p. 143.

The bill was sustained as a general creditors bill, and administration was had of the affairs of said Carnegie Land Company thereunder.

Stipulations, id. id.

On May 28, 1895, Wilberforce Sully, trustee, and A. B. Carhart, mortgagee and holder of issue of first mortgage bonds, filed also an original bill in the same court against

said Carnegie Land Company and others to foreclose a first mortgage to secure bonds made to Sully, trustee, which had been registered February 10, 1893. This was consolidated with the general creditors bill, and the two cases were heard and tried together.

Id. id.

This mortgage was made while the Carnegie Land Company was a solvent and going concern, and covered all the property, real and personal, of the Company, and was a first mortgage and lien upon all of said property, except upon the Carnegie Hotel, the Travelers Insurance Company having first mortgage upon the hotel, and that of Sully, trustee, on its face being subject to that of the Travelers' Insurance Company as to said Hotel.

Stipulations, tr. p. 145.

Publication was made requiring all persons claiming to be creditors of said corporation, to intervene in said cause and set up their claims, and creditors did come in, and all claims were adjudicated, and no question is made in this court as to amounts allowed any creditors in the Tennessee courts.

Stipulations, tr. pp. 143-145.

The controversy in this court is between resident and non-resident creditors, and between resident and mortgage creditors, as to priorities under said Act of 1877, chapter 31, in the distribution of the assets of the Carnegie Land Company, depending upon the constitutional questions made in and decided by the Supreme Court of Tennessee.

Id., 145.

The Supreme Court of Tennessee upheld said Act and Section 5 thereof, and gave priority to Tennessee, over non-

resident, creditors and citizens, whether said non-residents were general creditors or mortgagees.

Decree of Supreme Court of Tenn. m tr. p. 87.

Plaintiffs in error are general creditors of the Carnegie Land Company, except that A. B. Carhart is a general creditor to the amount of about $3,000.00, and also a mortgage creditor for over $100,000.00, and this brief now presents the rights only of the general creditors, appellant—to be followed by separate brief for A. B. Carhart, mortgagee.

Plaintiff in error A. B. Carhart is the only general creditor who specifically and in his own behalf raised the questions now involved in the lower courts and in the Supreme Court of Tennessee, there being a stipulation of counsel to the following effect, "14th. Page 19 of the printed assignments of error of Sully, trustee, and A. B. Carhart attached to and certified between pages 2078-2079, volume 6 of the transcript, referring to the unconstitutionality of the Act of 1877, chapter 31."

Tr. p. 146.

The said assignment of error on that point, from the Court of Chancery Appeals, made in the Supreme Court of Tennessee, is as follows: "Appellant further assigns as error in the decree of the Court of Chancery Appeals that they should have held that said Act of 1877, before referred to, violates the Constitution of the United States, especially in that section of the same which provides for priority of Tennessee creditors over foreign creditors and citizens in the distribution of assets of such foreign corporation doing business in this State. The sections of the Constitution violated are section 2 of Article IV of the Constitution of the United States, and the latter part of the same,

which is as follows: 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'

"And section 1 of Article XIV of the amendments to the Constitution of the United States, and the latter part of the same, which is as follows: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"This question has been determined adverse to the contention of appellant by this court in the case of Embreeville Land & Freehold Company, in an oral opinion, and the constitutional question in the same case is now pending before the Supreme Court of the United States, and will doubtless be decided prior to the hearing of this cause in this court. In case it is not passed on, we desire the court to pass upon this question in this cause, so that in the event the Supreme Court of the United States declares said provision of said Act unconstitutional appellant may take advantage of the same in the Supreme Court of the United States. For the reason that the question has been expressly determined by this court, we forbear to make any argument upon the same here."

Tr. p. 86.

It will be noticed that here A. B. Carhart makes the questions, decided adversely to him and all other creditors, by the Supreme Court of Tennessee, which are made here by assignment of error. This assignment was answered by the decree of that court as follows: "II. That said Act (refer-

ring to Act of 1877, chapter 31, of the General Assembly of Tennessee) or any part thereof is not in contravention or violation of the Constitution of the United States, Art. 4, Sec. 2, or of Art. 14, Sec. 1, of the amendments to said Constitution.

So that the questions here raised are clearly made by Appellant Carhart in the Supreme Court of Tennessee, and decided there.

The contention on the part of Sully and Mrs. Myton is that they and E. C. Manning, assignee, being general creditors in like class with Carhart, and all their rights to equal distribution depending on the constitutionality of the same Act, the defense was joint, and the raising of the question, and its decision by the Supreme Court, was, in a legal sense, the raising of the question by all general creditors like affected, which point will be discussed at its proper place.

ASSIGNMENT OF ERRORS.

(Being the same as filed from the final decree of the Supreme Court of Tennessee, style of cause here omitted. and part of transcript filed in this court, and printed herewith according to stipulations of counsel set out and annexed to this brief.)

ALFRED B. CARHART, WILBERFORCE SULLY, AS ASSIGNEE OF THE CLAIMS OF E. C. MANNING AGAINST CARNEGIE LAND COMPANY, AND MRS. MARY P. MYTON, BY THEIR SOLICITORS, FEELING THEMSELVES AGGRIEVED BY THE FINDINGS AND DECREE OF THE SUPREME COURT OF TENNESSEE IN THE ABOVE ENTI-

TLED CAUSE. ASSIGN ERROR THERETO AS FOLLOWS:

I.

That the said court erred in finding that the Act passed by the General Assembly of Tennessee on March 19, 1877, and approved March 21, 1877, being chapter 31 of the Acts of 1877, of General Assembly of Tennessee, and especially section 5 thereof, was not in violation of section 2 Article IV of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and, said court erred in giving preference and priority under said Act, the same being invalid for foregoing reasons, to residents and citizens of Tennessee over appellants, who were residents and citizens of States other than Tennessee, in the distribution of the assets of defendant corporation, on its becoming insolvent.

II.

Said court erred in holding that said act, and especially said section 5 of the same, was not a violation of section 1, Article XIV of the Amendments to the Constitution of the United States, which provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." The act, in this cause, by the enforcement of the same by said court as against appellants, and the barring of appellants themselves from participation in the distribution of the assets of defend-

ant company, until after full satisfaction of debts of residents and citizens of Tennessee, in its operation abridged the privileges and immunities of appellants as citizens and residents of the United States.

III.

That said court erred in not enforcing the rights of appellants to share in the like form and manner in the distribution of the assets of the defendant company with residents and citizens of the State of Tennessee; that, appellant A. B. Carhart, of the class and representation of all other general creditors, citizens and non-residents of Tennessee, and residents and citizens of the United States, raised the question herein made as to the violation by said act of 1877 enforced against appellants in the above cause by the Supreme Court of Tennessee, of section 2 Article IV of the Constitution of the United States, as set out before and in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a decision in this suit could be had, and claimed the rights, privileges and immunities guaranteed to appellants under said provision of the United States Constitution, and the decision of said Supreme Court of Tennessee was against the rights, privileges and immunities so claimed by appellants under said provisions of the Constitution of the United States.

All of which is here assigned as error.

BRIEF AND ARGUMENT.

The first assignment of error raises the question which we think conclusive of the controversy, so far as it lies between Tennessee creditors and creditors who are residents and citizens of other States.

If plaintiffs in error and E. C. Manning, from this record, are residents and citizens of State other than Tennessee, to-wit: of the State of New York; and if appellants have raised and had decided in the Supreme Court of Tennessee the federal question now presented, within the meaning of the law, then this case falls directly within the case of Blake vs. McClung, 172 U. S., 239, which holds the very identical act and section thereof now complained of, a violation of section 2 Article IV of the Constitution of the United States.

1. Our first insistence is that plaintiffs in error are citizens of a State other than Tennessee.

It is agreed in the stipulations of counsel that neither Wilberforce Sully, trustee, A. B. Carhart, Mary P. Myton, nor E. C. Manning, whose assignee Wilberforce Sully is, proved, or attempted by evidence to show in what jurisdictions they were citizens respectively.

Stipulations, tr. 147.

Neither did Blake or Rogers, in the Blake-McClung case before referred to, prove or attempt "by evidence to show in what jurisdictions they were citizens respectively," on that point this court saying, "The suggestion is made that as the statute refers only to residents, there is no occasion to consider whether it is repugnant to the provision of the National Constitution relating to citizens. We cannot accede to this view. The record shows that the litigation proceeded throughout on the theory that plaintiffs in error, Blake and the persons composing the firm of Rogers, Blake & Co., were citizens of Ohio, in which State they resided, transacted business and had their offices," etc. "The intervening petition of the plaintiffs in error, states that they were residents of Ohio, engaged in business in that State, their

residences, offices, and places of business being at the city of Cincinnati, and that they were citizens of the United States, and not citizens of Tennessee, although these allegations might not be sufficient to show that those parties were citizens of Ohio within the meaning of the Statute regulating the jurisdiction of the Circuit Courts of the United States (Robertson vs. Cease, 97 U. S., 646), they may be accepted as sufficient for that purpose in the present case, no question having been made in the State Court that the individual plantiffs in error were not citizens, but residents of Ohio."

So also in the case at bar it is admitted that the residences of the plaintiffs in error were in the State of New York, and "non-residents within the meaning of the Act in question," and all residents of Tennessee are set out.

Stipulations, tr. 144-147.

That the place of business of Sully and Carhart was New York City, appears inferentially in the original bill filed by them.

Tr. pp. 15-23.

In addition to this statement and the stipulation, it further is manifest that plaintiffs in error as well as all other parties, recognized that plaintiffs in error were citizens of a State other than Tennessee, and never questioned the fact, which the court can see was susceptible from this record, of the easiest affirmative proof, if unadmitted. The question of the violation of Article IV, Section 2, by the act in question, was made at an early stage of the cause by Sully and Carhart, was passed on in the Courts of Chancery Appeals and in the Supreme Court on the ground of the violation of

the rights of said Sully and Carhart as citizens of another State, by the enforcement of said act.

Assignments of Sully and Carhart, tr. p. 86.
Assignments of error in Court of Chancery Appeals, tr. p. 124.

No party to this record there denied, in answer to assignments of error, or otherwise, in argument, that the parties assigning were not citizens of another State and not entitled to raise the question. This is affirmatively shown by the decree of the Supreme Court of Tennessee, which meets the question fairly as one properly raised by a citizen of another State and decided on that, the only theory presented or relied on before them. In the assignments of error in the Supreme Court of Tennessee by Sully and Carhart, it is objected by them that said act of 1877, chapter 31, "which provides for priority of Tennessee creditors over foreign creditors and citizens in the distribution of assets of such foreign corporations doing business in this State, violates Section 2, Article IV (setting it out), and also Section 1, Article XIV of the amendments," etc., which was not answered by the Court's saying that the question was not raised by a proper party, i. e., a citizen of another State, but on the contrary treated the question as it has been treated all through the litigation, as one involving the rights of citizens of other states and decided it on its merits.

The general creditors bill in the cause below was filed by the American National Bank et al., who, by permission of the court, intervened in the Sully and Carhart bond case in behalf of themselves, as Tennessee creditors, and in behalf of all other bona fide creditors of the Carnagie Land Company.

These people acting for all others in their answer at the threshhold say, "Respondents will here show that even if said mortgage were valid, and said $85,000.00 of bonds were in fact issued, the debts sued on by the American National Bank and Shields Bros., were contracted by the Carnegie Land Company and owing long before the execution and registration of said mortgage, and that therefore these debts owing to citizens and residents of Tennessee prior to the execution and registration of said mortgage would have priority under the law over any debt secured or intended to be secured by said mortgage."

Answer of Am. Nat. Bank et al., tr. p. 30.

This answer was filed August 2, 1895, and then and thereafter, in this record, the words residents and citizens were used as meaning citizens under this statute. The parties and the court so treated it and we insist that it is now too late in this court to depart from it in order to side-track a plain constitutional right. Another and conclusive answer to such contention, if made, that plaintiffs in error are not citizens of another State than Tennessee, grows out of the plain language of the stipulations of counsel, i. e., "within the meaning of said act," and that their residence is in the State of New York.

Stipulations, tr. p. 144.

Now, what is a "non-resident creditor within the meaning of said act?" This was settled and well known to counsel, because the leading counsel of creditors opposing plaintiffs in error were of counsel in the case of Blake vs. McClung, wherein the court said, "Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this State' refer to those whose residence in

Tennessee was such as indicated, that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention when absent from the State to return thereto; such residence as appertained to or inhered in citizenship. And the words in the same statute, 'residents of any other country or countries' refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents of some other State or country."

172 U. S., 247.

Now, if appellants were "non-residents within the meaning of the act" which meaning and construction had been given by this court, before this case, then plaintiffs in error being "non-residents within the meaning of the act" are admitted to be citizens of New York.

2. If appellant Carhart, as general creditor, is then a citizen of New York, as seems clear, and raised and had decided the federal question here involved, as is manifest, then his right to a reversal of the decree is undisputed; but it will be insisted that plaintiffs in error, Wilberforce Sully, as assignee of E. C. Manning, and Mrs. Myton, did not appear in the Supreme Court of Tennessee, and did not raise and have decided the federal question here made. As against this contention, we have two answers as to Wilberforce Sully as assignee: 1. That Wilberforce Sully, trustee, was in the Supreme Court; that he raised this question and had a decision, and having done so in one right, it does not change the person of the exceptant, and that within the meaning of the law Wilberforce Sully raised the federal question, was in court, and can maintain this writ of error. 2. That the status of Wilberforce Sully and also Mrs. Myton was that of A. B. Carhart, and that if the Supreme Court of Tennessee

had, on the appeal and writ of error of A. B. Carhart and Sully, trustee, declared the act of 1877, chapter 31, and section 5, unconstitutional, the decree would have been pronounced, under the practice of that court, not only in behalf of Carhart and Sully, trustee, but in behalf of all other creditors in like situation, whether before the court by appeal or not, and that in remanding the cause for distribution of the funds, all citizens of the United States not citizens of Tennessee would have shared the fruits of Carhart and Sully's action, and that therefore, within the meaning of the law, these other creditors were raising the federal question now made, through the person of their representative, by way of joint defense, and on an adverse decision, have the individual right to abide by that decision, or to now prosecute a write of error to this court.

So far as we are able to discover, this question has not been before this court in this form, and the decision as to the necessity of the raising of the federal question by plaintiffs in error, in the highest court of the State, have been only in cases where the plaintiff in error did or did not sufficiently, properly, or opportunely raise the question himself, and the question here presented did not arise.

4 Wall., 177-180;
11 Wall., 36-39;
92 U. S., 327;
125 U. S., 54;
137 U. S., 300;
150 U. S., 433;
163 U. S., 63;
154 U. S., 114.

It seems to have been settled inferentially by this court, that if according to the practice of the particular State, the

point is raised, and in such way as to necessarily call for a decision upon the point, and such a decision as would necessarily, according to practice of the State, inure to the benefit of other parties like or jointly interested, if favorable, then that the point is raised by such party, within the meaning of the federal law upon the subject, and writ of error by such party whose rights are thus determined, may be prosecuted to this court. As was said by this court in the case of Morrison vs. Watson, 154 U. S., 115: "In order to give this court jurisdiction of a writ of error, to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity, must have been specially set up or claimed at the proper time and in the proper way. If it were not claimed in the trial court, and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the State, it cannot be asserted in this court."

Thus it is held that even though the question be raised in the highest court of the State, yet if the practice of that court precludes the consideration of the question by such court, on account of the same not being raised in the trial court, a writ of error cannot be maintained. So, on the contrary, it would follow, it seems, that if according to the practice of the court in question, the question was raised specially, and called for a determination of rights directly affecting plaintiffs in error, Sully and Myton, and which, if decided favorably, would have been held by that court to include plaintiffs in error, and decided adversely was held to exclude them, then writ of error could be prosecuted and

maintained. As stated in such case by Mr. Guthrie, "The question thus often becomes one of the practice in the particular State."

Guthrie on Fourteenth Amendment, p. 156.

Then, under the practice in Tennessee, would the decision of the question now raised by plaintiffs in error in this court, and raised by them through A. B. Carhart in the Supreme Court of Tennessee, if decided favorably to Carhart by said court, have been in favor also of Sully, as assignee, and Mrs. Myton, and have been so declared by said court under its holdings?

It is the uniform holding in Tennessee that "A broad appeal by any one party from an entire Chancery Decree, where the matter is purely of equitable cognizance, carries up the whole case, so as to allow relief to be granted to those who do not appeal."

Note 4 to Sec. 4891 Shannon's Code of Tennessee, citing 2 Tenn. Chy., 574; 2 Heisk., 441-561; 3 Heisk., 598; 5 Heisk., 244.

The above cases support the text, and the case in 2 Heisk., 561, was one where only three defendants appealed, and yet relief was granted to all the defendants in the Supreme Court. So also was the holding in the case in 3 Heisk., 598.

The Travelers Insurance Company, and it seems, also, American National Bank, prayed broad appeals from the decrees of the Chancellor and Court of Chancery Appeals.

Tr. pp. 52 and 85.

"If a decree is severable or adjudges independent rights, it will remain in force as to those parties who do not appeal, and be vacated as to those who do appeal. On the other hand, where the proper decree will necessarily affect the parties who have not appealed, the Supreme Court, al-

though the appeal be taken by only one party, will determine the whole cause as it stood before any decree was rendered."

Note 6 to Sec. 4891, Shannon's Code of Tennessee, citing 3 Lea, 352.

The very language of Mr. Shannon applying to equity causes, is taken from the case in 3 Lea, 352, and approved in all subsequent cases, and it does not affect the question as to who appeals; and a broad appeal is not necessary, provided the appeal or writ of error calls for a decision upon the very question affecting the rights of the other parties.

See 3 Lea, 352; 11 Heisk., 299.

The same principle was announced by the same court as late as 6 Pickle, 32 and 383.

In the latter case, one heir only excepted to a Master's Report as to debts. The court said, "The decree was one confirming the settlement between the executors and the estate of Lewis Shanks, and confirming a Report of the indebtedness of the same to other creditors. A defense interposed to such Report goes necessarily to the whole decree, and results to the benefit of all, even though the others had failed originally to except, and were therefore in no situation to interpose defenses in an error proceeding. A defense interposed by one heir or devisee in an account such as this was, inures to the benefit of the estate, and its effect cannot be limited to the one so excepting."

We think these cases are conclusive as to the practice in Tennessee, and if a person not excepting to report of Master, which is confirmed, can by appeal from the decree, have the benefit of an exception by another appellant, as decided in last case cited, then we think it clear that a writ of error can be likewise prosecuted to this court to maintain and

have made effective a defense, which if sustained in the Supreme Court of the State, would have necessarily, according to the practice of that State, inured to the benefit of plaintiffs in error, and that, for this reason, the right now set up was "specially set up and claimed" in the highest court of the State, according to the practice of said State. If this is so, then all the appellants, general creditors, citizens of New York, are entitled to a reversal of the decree of the Supreme Court of Tennessee under the case of Blake vs. McClung, 172 U. S., 237.

If the assignments of error are well taken, and even if the mortgage of A. B. Carhart is valid, and Section 5 of the Act of 1877, chapter 31, violates only Section 2, Article IV of the Constitution, and for that reason the Travelers Insurance Company, a foreign corporation, is entitled to no relief, it not being a citizen within the meaning of Section 2, Article IV, and if, for any reason, A. B. Carhart, under his second mortgage, has no priority in the distribution of the proceeds of the sale of the hotel property covered by Travelers Insurance Company's mortgage, then plaintiffs in error insist they are entitled equally with Tennessee creditors to share in the distribution of proceeds of said hotel property.

Shields Bros., one of the Tennessee creditors in the original bill below has conceded the contention of plaintiffs in error, since the decision of Blake vs. McClung, supra., and now makes such concession.

R. E. L. MOUNTCASTLE,
For Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

WILBERFORCE SULLY, TRUSTEE, ET AL., vs. AMERICAN NATIONAL BANK ET AL. | UNITED STATES SUPREME COURT, October Term, 1899.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF OF A. B. CARHART, MORTGAGEE, AND WILBERFORCE SULLY, TRUSTEE, SETTING UP THEIR RIGHTS UNDER THEIR MORTGAGE MADE BY DEFENDANT CARNEGIE LAND COMPANY.

THE RIGHTS OF THE GENERAL CREDITORS PLAINTIFFS IN ERROR. ARE, OF COURSE, SUBORDINATED TO THE RIGHTS OF PLAINTIFF IN ERROR CARHART, MORTGAGEE, AS TO THE PROCEEDS OF THE PROPERTY COVERED BY THE LATTER'S MORTGAGE, IN THE EVENT THIS COURT IS OF OPINION THAT THE ACT OF 1877, CHAPTER 31, SECTION 5, IS INSUFFICIENT TO DIVEST THE LIEN OF THE SAME.

I.

STATEMENT OF THE CASE.

We here adopt the statement of the case made in the brief of plaintiffs in error, Sully, Carhart, and Mrs. Myton.

II.

ASSIGNMENT OF ERRORS.

(Being the same filed in the Supreme Court of Tennessee from the decree of said court, omitting style of cause, and transcribed in the record to this court, at pages indicated in stipulations, printed at the close of this brief.)

WILBERFORCE SULLY, TRUSTEE, AND ALFRED B. CARHART, RESIDENTS AND CITIZENS OF THE STATE OF NEW YORK, BY THEIR SOLICITORS, FEELING THEMSELVES AGGRIEVED BY THE FINDINGS AND DECREE OF THE SUPREME COURT OF TENNESSEE IN THE ABOVE ENTITLED CAUSE, ASSIGN ERRORS THERETO AS FOLLOWS:

I.

That the said court erred in finding and holding that the Act passed by the General Assembly of Tennessee on March 19, 1877, and approved on March 21, 1877, being chapter 31 of the laws of Tennessee of 1877, defining the terms upon which foreign corporations organized for mining and manufacturing purposes might do business in Tennessee, and especially section 5 thereof, was not in violation of section 2, of Article IV, of the Constitution of the United States which provides that, "The citizens of each state shall be entitled to all privileges and immunities of the citizens of the several States;" and said court erred in holding thereunder that Tennessee creditors were preferred by virtue of said void act, over appellants, as citizens and residents of other States. in the distribution of the assets of defendant Company; that, said court should have held that as appellants were residents and citizens of the State of New York, and as the act in question gave an unauthorized preference, privilege and im-

munity to residents and citizens of Tennessee, by virtue alone of said residence and citizenship, the act and section thereof was unconstitutional and in violation of said clause of the Constitution of the United States, as against appellants, in this:

a. Because, outside of their mortgage, appellants being the holders of the first registered mortgage upon most of the property of defendant company, and being the holder of the second mortgage to the Travelers Insurance Company, another appellant, upon the remainder of the property of the defendant company, appellants were at least entitled to share in all the assets of the defendants Carnegie Land Company, equally with residents and citizens of Tennessee.

b. By virtue of the mortgage above indicated held and declared by said court in favor of appellants, they, as citizens and residents of the State of New York, were entitled to the full security of their said mortgage upon all the property of the defendant company, both that covered by the first mortgage of appellants, and that covered by the second mortgage of appellants, as against all parties, Tennessee creditors, and all other citizens or corporations of other States, appellants taking the proceeds of the property upon which they hold the second mortgage, in the event the first mortgage, Travelers Insurance Company, for any reason, is not able to hold, by virtue of being a foreign corporation, and not a citizen within the meaning of the Constitution of the United States· the said Supreme Court of Tennessee should have thus held with respect to the rights of appellants under the mortgage, for the reason that said Act of 1877 and section 5 thereof does not impose upon the mortgagees, citizens, or residents of Tennessee any such postponement of their rights, as is sought to be imposed upon

mortgagees, residents, and citizens of other States than Tennessee, to-wit: the postponement of such non-resident mortgagees to the debts, contracts, and engagements of Tennessee resident creditors contracted prior to the making and registration of such valid mortgages, said act especially placing a burden upon and withholding a benefit from the non-resident mortgagee, that is not placed and withheld respectively in so far as Tennessee mortgagees are concerned; that if said act and section is valid as to the Travelers Insurance Company holding first mortgage upon part of the property, on account of the fact that the latter is not a citizen of another State than Tennessee, within the meaning of Section 2, Article IV of the Constitution, it nevertheless is true that said act is invalid as to appellants with reference to their lien upon not only the property upon which they hold their first mortgage, but also upon the particular property covered by the mortgage of the Travelers Insurance Company, as against all simple contract creditors—resident or non-resident creditors; and this the said court should have held, and their refusal to do so was manifest error.

2.

That in the Chancery Court held at Johnson City, in Washington County, Tennessee, being the court which had and exercised the original jurisdiction in the above entitled cause, the appellants herein specifically set up and claimed that they were entitled to the privileges and immunities guaranteed in Section 2, Article IV of the Constitution of the United States, viz.: "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and that they were deprived of such privileges and immunities by the Act of Tennessee approved March 21, 1877, above referred to; and, also, that

their rights, privileges, and immunities, as citizens of the United States, were abridged by the provisions of the statutes of the General Assembly of Tennessee, approved March 21, 1877, above referred to, under the provisions of Section 1 of Article XIV of the Amendments of the Constitution of the United States, and that they were also deprived of their property and rights without due process of law by the enforcement of said invalid Act of said General Assembly of Tennessee but the decision of said Chancery Court was against said rights, privileges, and immunities so claimed by appellants; and, the same rights, privileges and immunities so set up and claimed by appellants in said Chancery Court were again set up and claimed by said appellants in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a suit of this kind could be had, and the decision of said Supreme Court was against appellants.

All of which is here assigned as error.

3.

That the said Supreme Court of Tennessee erred in finding and holding that the said Act of the General Assembly of Tennessee, passed March 19, 1877, and approved March 21, 1877, and being chapter 31 of the Acts of 1877, and especially Section 5 thereof, which was enforced against appellants in the above entitled cause was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" but

said court should have held that said Act, and especially Section 5 thereof, did abridge the rights and privileges of appellants as citizens of the United States, and did deprive appellants, as mortgagees, of their property and rights, without due process of law, and deprived them of the equal protection of the laws, in this:

a. That said mortgage was made by a solvent and going corporation, to-wit, the defendant Carnegie Land Company, authorized to make the same under the laws of Tennessee, and having the constitutional right as a solvent and going concern, to contract as any other person or corporation within the State of Tennessee, which constitutional right of the parties to said contract, to have the same enforced substantially as provided by the terms thereof, could not be taken away by statute, on the happening of a future event or winding up of the mortgagor, Carnegie Land Company —such arbitrary statute destroying, in this case, by its application, the ability and right of such a going concern to use and handle its property and contract with respect thereto, as permitted to all other solvent holders and owners of such property within said State;

b. That court should have held that said Act, and Section 5 thereof, which was enforced against appellants, and through which Tennessee creditors were given priority over appellants in the distribution of the assets of the defendant Company, though first mortgages, was in violation of said Section 1 of Article XIV of the Constitution of the United States, and was not "due process of the law," because said Act and section was class legislation within the meaning of the law, in that the selection of the class subject to its provisions, to-wit: Foreign corporations permitted to do business as Tennessee corporations, in all respects, and whose

engagements were by said Act to be enforced in the same manner as provided by law for natural persons, was not a natural but an arbitrary selection of class, without any reason, public or private, pointed out or to be otherwise seen, why this particular mining and manufacturing corporation, more than any natural person or other domestic corporation, or other foreign corporation not organized for the purpose of manufacturing or mining, as embraced in the Act, should be deprived of the Constitutional right of other solvent and going concerns, or persons, to own, use and contract with respect to their property within the State, as allowed to all other property owners, and why the creditors of such corporation should be required to take a mortgage subject to the priority in favor of unknown debts and debtors theretofore contracted, in the event of subsequent insolvency, when mortgagees of no natural person, domestic corporation, or other foreign corporation, except manufacturing and mining, are required to be so postponed and deprived of their ordinarily legally acquired rights. In enforcing the Act against appellants, and not holding the same void, for the above reasons, and depriving thereby appellants of their property and rights, said court erred.

Wherefore, these appellants pray that this cause may be re-examined by the Supreme Court of the United States for writ of error for and on the errors assigned, and said findings and decree of the said Supreme Court of Tennessee may be reversed.

III.

BRIEF AND ARGUMENT.

I.

It is unnecessary to again take up the argument as to the citizenship of Sully, trustee, and Carhart, mortgagee, and we refer to the argument advanced in the brief of plaintiffs

in error, Sully, Carhart, and Myton, upon the question of citizenship, but the question we desire to first discuss, arises under the first assignment of errors, and presents for the consideration of this court the question, whether Section 5 of Chapter 31, Act of 1877, before set out, grants to Tennessee citizens, who are mortgagees and judgment creditors any privilege or immunity over judgment creditors or mortgagees who may be residents and citizens of a State other than Tennessee.

This part of the Act and of Section 5, to be construed, is the following: "Nevertheless creditors who may be residents of this State, shall have a priority in the distribution of assets, or subjection of the same or any part thereof to the payment of debts, over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts, which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid and shall constitute a prior lien on the property on which they are or may be charged, as against all debts which may be incurred subsequent to the date of their registration or rendition."

It will doubtless be insisted by defendants in error that there is no burden placed upon non-resident citizens, mortgagees and judgment creditors, that is not placed upon resident mortgagees and judgment creditors. In other words, that Tennessee creditors who have no mortgage and no judgment, have priority over mortgagees and judgment creditors, if the debts of the former were contracted before the registration of the mortgage or the rendition of the

judgment, regardless of the residence or citizenship of the mortgagees or judgment creditors.

Stated differently, the proposition is, that a Tennessee creditor who has no judgment and no mortgage, shares with all other Tennessee creditors until the former takes judgment or mortgage, and by that act, he loses his right to share with Tennessee creditors, and instead of getting a benefit by his diligence, in case of subsequent insolvency, he not only loses the lien of his judgment or mortgage as to all debts contracted to Tennessee creditors before the registration or rendition, but in addition loses even that right that he formerly had as a general creditor. This looks remarkable on its face, and such construction must be imperative to justify the idea that the Legislature intended so unheard of, absurd, and unjust a proceeding. What possible reason can any one give for such an act, in the light of such construction? Is there anything in the remainder of the Act which leads to the conclusion that the Legislature intended here to say that a Tennessee creditor took a judgment, the ordinary process of law, against a foreign corporation owing him, only on the penalty of thereby taking, in the event of subsequent insolvency, subject to all Tennessee creditors, whose debts were contracted before his judgment was taken, although the other Tennessee debts may have been contracted years after the debt of the judgment creditor was contracted?

The whole act shows an intention to protect Tennessee creditors over foreign creditors, but no part of it shows any intention on the part of the Legislature to burden or punish one Tennessee creditor for the benefit of another. What public policy would justify such an unheard of proceeding, or what reason would support it? Why would the exercise

of ordinary process of law, allowed to all creditors for the collection of debt, visit upon the citizen of Tennessee, not the ordinary result, but the highest penalty, and a penalty which is higher than that visited upon the creditor who takes a judgment against a debtor corporation, already insolvent, no longer a going concern, and levies execution upon such corporation's goods, which penalty requires the creditor to lose only his apparent advantage, but yet permits him to share equally with all the other creditors.

No such proceeding is found anywhere else in Tennessee legislation, and it would prevent ordinary equality among Tennessee creditors, which is a cherished subject of such legislation, as evidenced by the general assignment law, and the law intended to prevent preferences by insolvent debtors.

Act of 1881, chap. 121;

Act of 1895, chap. 128.

The latter act was so drastic in its efforts to enforce equality of distribution of the assets of all debtors, that the Supreme Court of Tennessee was forced to declare it unconstitutional, as violating the right of every solvent debtor to use and dispose of his property as he saw fit.

13 Pickle, 604.

In view of these stringent statutes to enforce equality among creditors, it would be strange if the Legislature, as is contended for on the other side, should swing completely to the other side without any reason, and say that a Tennessee judgment or mortgage creditor of a solvent concern, although universally in Tennessee, outside of this statute, in case of a judgment of a court of record, and of a mortgage registered, entitled to a recognized priority, is not even entitled to equality with other Tennessee creditors, if his

debtor happened to be a foreign corporation, doing business under the Act of 1877, chapter 31. What reason can be given for this arbitrary selection for punishment of Tennessee judgment creditors of a corporation, instead of likewise extending the punishment to such a creditor of an individual? Why not also to the judgment creditor of a domestic corporation? Why single out the Tennessee judgment creditor of only a foreign corporation organized for the purpose of manufacturing or mining?

If the construction of the language under review insisted on by defendants in error is correct, then the act violates the Tennessee constitution, and such a construction will be repelled by this court, if our view of it is correct, unless this court can find no other.

It is said by the Supreme Court of Tennessee in the case of Morris claimants vs. Stratton claimants, speaking through Ed Baxter, Special Judge, quoting the syllabus, "'Law of the Land,' correctly defined, means a law 'which embraces all persons who are or may come into like situation and circumstances.' It may be made to extend to all citizens, or be confined under proper limitations to particular classes. If the class be a proper one, it matters not how few the persons who may be included in it," and further, "Whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of this classification must be natural and not arbitrary. If the classification is made under Article XI, Section 8 of the Constitution for the purpose of conferring upon a class the benefit of some special right, privilege, immunity or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.

If the classification is made under Article 1, Section 8 of the Constitution for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should alone be subject to the burden."

5 Pickle, pp. 499-500.

Is there any "good and valid reason" why a Tennessee creditor of this particular kind of corporation, even if first debt created by such corporation, to promote its earliest enterprise and bring it into active being, should lose all rights of equality with other Tennessee creditors, by taking judgment or mortgage? If there should be conjured up some sort of reason, why would such reason not apply to such Tennessee creditor of other foreign corporation, domestic corporation, or even private person?

As the construction contended for by defendants in error would thus necessarily make the Act a violation of the Tennessee Constitution, as we insist, and as the construction we insist on is the one more natural and reasonable, and in consonance with the Tennessee Constitution, and the legislative purpose and policy, otherwise expressed, this court will give it the construction that the Legislature intended, i. e., to burden foreign citizens and residents who were mortgage or judgment creditors, with the priority of Tennessee creditors, contracted before, in the event of subsequent insolvency, and especially as all the Courts of Tennessee in the case at bar have practically and in effect so construed the Act, by decreeing that Tennessee judgment creditors should share equally and on the same basis as simple contract Tennessee creditors, when, if contention of defendants in error, now insisted on, had been insisted on by them in the State Courts,

and had been agreed to by the latter, Tennessee judgment creditors should have been postponed in favor of the debts of other Tennessee creditors contracted before the rendition of such judgments. Every Tennessee judgment creditor, on judgment rendered against Carnegie Land Company, was permitted to share equally with other Tennessee creditors.

H. C. Jarvis obtained a decree against Carnegie Land Company, Sept. 15, 1895, on debt contracted in 1890, and was allowed to share on a basis of equality with other Tennessee creditors, in the decrees of the Tennessee courts, notwithstanding the rendition of the decree.

Tr. Decree of Court of Chancery Appeals, p. 81.

It is one of the Tennessee creditors.

Stipulations, p. 143.

See also adjudications of Chancellor as to Tennessee creditors as a class, confirming Report of Master, tr. pp. 39-45-49.

Decree in above cause was rendered after general assignment of Carnegie Land Company.

In case of Frame King, a non-resident creditor was allowed to share as a Tennessee creditor, by virtue of right of Preas, a Tennessee creditor, who made payments as surety to King for his principal, the Land Company.

Decree of Supreme Court, p. 88.

This was by virtue of a decree rendered in favor of King, June 8, 1893, five days after the general assignment of defendant Land Company, June 3, 1893.

Decree of Court of Chancery Appeals, p. 82.

Maiden and wife, Sully assignee, was permitted to share with other Tennessee creditors.

Decree of Court of Chancery Appeals, p. 78.

This decree was rendered June 7, 1893, four days after the assignment, June 3, 1893. All these decrees were rendered before the general creditors bill of defendants in error was filed, Nov. 27, 1893, and before said bill was sustained for the distribution of the assets.

For the above reasons, we insist that the Act in question properly construed by this court, grants an immunity to Tennessee judgment and mortgage creditors, and imposes upon non-resident judgment and mortgage creditors, citizens of other States, the burden of submitting to a priority in favor of Tennessee creditors, whose debts were contracted before said mortgages were registered or judgments rendered.

This makes out a case clearly within the second section of Article IV of the Constitution of the United States, and mortgagees, citizens of other States, are entitled to priority, by virtue of their mortgages, to the same extent as would Tennessee mortgagees, the said mortgage of plaintiff in error having been made by a solvent concern, as agreed in the stipulations of counsel, and the Act in controversy having sought to deny this privilege to citizens not of this State, which is granted to residents of Tennessee, the said Act is void, and plaintiff in error should be decreed to be paid his debt, first out of the proceeds of the sale of the property covered by his mortgage, without abatement, except for the commission to be paid to the Clerk and Master for making sale of the property mortgaged.

This Act out of the way, plaintiff would take, under the

law of Tennessee, as above indicated, and under this Act, a mortgagee would likewise so take, and the measure of the Tennessee mortgagee's right is the measure of the right in all respects of plaintiffs in error. For status of Tennessee mortgagee

See 95 Tenn., 142-144.
91 Tenn., 12.
95 Tenn., 696.

If, for any reason, the mortgage of plaintiff would not hold the first lien, the mortgage debt, under the decision of Blake vs. McClung, supra, should share equally with Tennessee creditors, as stated in first assignment of error.

We furthermore insist, that, although the mortgage of Appellant Carhart is only the second mortgage on the particular piece of property, covered by the mortgage of the Travelers Insurance Company, to-wit: the Carnegie Hotel, yet the Travelers Insurance Company is not a citizen of the United States, within the meaning of the section of Article IV of the Constitution of the United States, and for that reason the Act in question is valid as to it.

Blake vs. McClung, supra.

This being the case, as a Tennessee mortgagee would by virtue of a second mortgage have priority in the distribution of the proceeds of sale of said Hotel property, so also plaintiff in error is entitled to like priority.

II.

We next insist that Section 5 of the said Act in controversy also violates Section 1 of the XIV Amendment to the Constitution of the United States, in this, that said Act seeks to deprive plaintiff in error of his property without due process of law.

The validity of said mortgage, and that it was made by a going concern, is admitted in the stipulations of counsel.

Tr., 145.

It has been said by this court, in the case of Blake vs. McClung, supra, "It does not follow that within the meaning of that Amendment" (meaning the XIV Amendment) "the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed."

172 U. S., 262.

It will be recalled that the claim of the Virginia corporation was only a claim of a general creditor, and no right of a mortgagee was involved in any wise in that case.

Can it be said that if a corporation has the right by law to contract a mortgage, fixing a lien upon property, and by law is deprived, in fact, as in this case, of that lien and debt, in favor of general creditors, of whom no notice is given to the mortgagee, by registration or otherwise, in consequence of an act happening after the making of the valid contract, through no act of the mortgagee, such a law is not depriving that mortgagee of his property, the lien of his note, which alone perhaps gives it important value?

If such an act produces the effect indicated, does it not, in fact, deprive the mortgagor and mortgagee of their liberty of contract, and of alienation of property, without due process of law?

These questions were specially set up and claimed in the

Supreme Court of Tennessee by plaintiff in error, and decided adversely to him.

Assignment of error of plaintiff in error, tr. 106; Decree of Supreme Court, tr. 87.

In addition to the foregoing points of objection, we insist that the said Act is not due process of law, because it is class legislation, and the selection of components of such class is entirely arbitrary, without any good, sound or plausible reason for same.

As to the first and second propositions, which may well be considered together, our insistence is that it is the right of every concern, going and solvent, authorized generally to do business in a State, and it is also the right of one proposing to deal with such concern, to contract, and in the enforcement of such right, to provide for a mortgage on the property of debtor, not subject to any future act or condition of such going concern, and that the right of such concern, legally doing business, to make such preference, cannot be legally prevented.

It is provided in Section 4 of the Act in controversy, that such corporation may acquire and hold real estate, and "may sell and convey such real estate as natural persons may do."

Here the corporation, admitted, on the performance of conditions precedent, has then, being admitted, the same constitutional rights as any natural person—and any fundamental or constitutional right cannot be taken away by any subsequent contingency happening after the admission of said corporation.

It has been decided in Tennessee that private corpora-

tions have the implied power to make mortgages without legislative authority, as is necessary in case of public corporations, such as railroads.

4 Pickle, 152.

We then insist that if the right to grant a preference, on the part of a solvent and going concern, to one of its creditors, is a fundamental right of property, and protected by the Constitution as such, then the right of a creditor to rely on same, cannot be taken away by a statute, under the guise of "terms" under which solvent and going concern shall do business in this State.

As quoted approvingly by the Court in the Blake-McClung case, from the case of Lafayette Insurance Company vs. French, 18 Howard, 404-407, "A corporation created in Indiana can do business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law, which secure the jurisdiction and authority of each State from encroachment by all others, or that principal of natural justice which forbids condemnation without opportunity for defense."

Blake vs. McClung, 172 U. S., 255.

In other words, a State may make reasonable regulations, but not by so doing deprive citizens or property owners of constitutional rights which they have as solvent owners of such property.

Is the right to make a preference to one creditor by mort-

gage, on the part of a solvent debtor, a constitutional right? The preference in this case was made by mortgage to plaintiff in error, by defendant Carnegie Land Company while a solvent and going concern, as is admitted. "The power of alienation of property is a necessity incident to the right of property, and was dictated by natural convenience and natural wants."

2 Kent's Com., 326,
Cooley's Con. Lim. (4th ed.), top page 493, Note 1, (6th ed.), 490.

"In America, the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance to our descendants in regular order and succession is enjoyed to the fullness and perfection of absolute right."

2 Kent's Com., pp. 327-328.

These quotations are approved in an able Tennessee opinion by Ed Baxter, Special Judge, in which it was decided that a statute preventing the transmission of property by a person non compos mentis, to his own descendants was unconstitutional, as not being due process of law or the law of the land.

The Stratton claimants vs. Morris claimants, 5 Pickle, 499.

It was also decided in a Tennessee case, in an opinion delivered by Chief Justice Snodgrass, that every solvent debtor had the constitutional right to dispose of his property in whole or in part, in good faith for the payment of his debts, and that meant the right to prefer.

13 Pickle, 610.

The court in the above case further says: "It is, and correctly, insisted that while this Act does not deprive him ab-

solutely of his property, it takes away from him that element of its value which consists in the right to use and legitimately dispose of it, and here it must not be forgotten that we are not dealing with the question of an insolvent debtor conveying its property or any part of it, or of a solvent debtor conveying his property, or any part of it, for the purpose of hindering, delaying or defrauding creditors."

Id., 610-611.

And, further: "To take from property its chief element of value, and to deny to the citizen the right to use and transfer it, in any proper and legitimate method, is as much depriving him of his property, as if the property itself were taken."

Id., p. 611.

The Divine Grocery Company, whose rights were involved in the above case, was a corporation.

The Act set aside in the above cause was "An Act to secure to creditors a pro rata distribution of the property, estates, and assets of debtors and to prevent debtors from making preferences among creditors by assignments, deeds of trust, mortgages, deeds, sales, pledges, or by any form of transfer or conveyance, or by confession of judgment," etc.

In-as-much as the Act in question prohibited a solvent debtor from making preferences in disposing of his property, it was held void.

The only ground manifestly upon which the Tennessee Supreme Court upheld the law in controversy in this case at bar, was that any conditions could be imposed upon the foreign corporation seeking admission into this State, because the same Act that violates the Tennessee Constitution as to the "law of the land," also violates the Fourteenth

Amendment to the Constitution of the United States as to "due process of law."

The general rule is thus stated by Mr. Cooley, "But there is no rule or principle known to our system, under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or special enactment."

Cooley's Con. Lim., (6th ed.) p. 435.
See also, 127 U. S., 678-684;
165 U. S., 590.

It will be noted, that in this case if the said Act is valid, the last estate of the mortgagor is worse than the first, after insolvency, over which he has no control.

Always, except under this statute, as shown by this court in case of Blake vs. McClung, 172 U. S., 254, in case of insolvency, all creditors who had not valid liens fixed, prior to insolvency, shared equally in distribution of assets after insolvency, but here, as never before, on insolvency, the mortgagee has not priority, as he has had up to that time, and has not equality, but goes from first to last—from having a first security, a property right of much value, he has no security in effect, and then takes his place at the foot of all, his property and security, under guise of law, sacrificed for the sole benefit of others. But it is said that he contracted with notice, and has no equity.

If the law be unconstitutional, notice of it is of no effect; but it is notice that does not notify. The Tennessee debts, contracted before the registration of the mortgage, are unknown in number and amount. They are not required to be registered. The debtor seeking additional credit on the faith of a mortgage, is not to be relied on to set out his indebted-

ness. It would simply be a leap in the dark. The mortgagee has no means of knowledge of the debts, and the insolvency which marks the end of his priority is beyond his control.

But it is said that this is analogous to lien laws and deposits of securities for certain creditors by Insurance Companies, which have been upheld. We submit, the cases are not at all analogous.

Liens, mechanic and otherwise, grow out of the work done or material actually furnished to which they attach. They are not floating equities as are the claims of Tennessee creditors in this case. They are not determined by future events, but go in with the property, and the acquisition of the property marks the beginning and the extent of the lien; but, in case of Tennessee creditors, their debts often have no relation to the property subsequently mortgaged.

The application of deposits in the State Treasury to the benefit of home creditors, in case of Life Insurance Companies, furnishes a further argument for our contention that a trust fund is applicable to the purpose for which it is designated and set apart, at a time when the Company setting it apart is solvent.

CLASS LEGISLATION.

We next insist that Section 5 of the Act of 1877, chapter 31, is not due process of law, because it is arbitrary classification of the most obvious character.

As has been said by distinguished authority, "If the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to

build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of Legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict, 'To forbid to an individual, or a class, the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty, in particulars of primary importance to their 'pursuit of happiness,' and those who should claim a right to do so, ought to be able to show a specified authority therefor, instead of calling upon others to show how and when the authority is negatived."

Cooley Con. Lim., p. 484. (6th ed.)

This applies with exactness to the present case when only foreign corporations engaged in manufacturing and mining, the introduction of whose capital into the State the Legislature desired to facilitate, are shorn of a right granted to all other foreign corporations, domestic corporations and all natural persons, under the Constitution, laws, and decisions of Tennessee.

What reason can be given for the selection of this class, which is to be deprived of its right to contract, as others, and whose mortgage and judgment creditors, citizens of other States, shall lose the lien of their mortgages and judgments in favor of simple contract Tennessee creditors, first contracted, when, if there be a purpose, it would equally apply to all persons and corporations like situated?

As well stated by the Tennessee Supreme Court in the case of the Stratton Claimants vs. Morris Claimants, 5 Pickle, 535, "If the classification is made * * * * for the pur-

pose of subjecting a class to the burden of some special disability, duty or obligation, there must be some good and valid reason why that particular class should alone be subjected to the burden."

In other words, the selection must be a natural, not an arbitrary selection. These principles seem so well settled that there would seem to be no question but that the Act in question is class legislation, and, for that reason, not due process of law, under the holdings of this court.

129 U. S., 626; 118 U. S., 356-359; 165 U. S., 159; 139 U. S., 462-468.

In the last named case, this court, speaking through Justice Brewer, said: "In all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification." "No State can deprive particular persons, or classes of persons, of equal and impartial justice under the law. Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

As stated further by the Supreme Court of Kansas, following 139 U. S., 462-468, "A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital, and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character."

State vs. Haun, decided Dec. 9, 1899, and reported in Advance sheets, Part 5, vol. 11, Am. & Eng. Corp. Cases, (N. S.)

We insist that the Supreme Court of Tennessee predicated its decree adverse to plaintiff in error, not upon the ground that the rights here claimed are not constitutional rights of every citizen of the Union, with respect to property, but upon the dictum in the case of Fritts vs. Palmer, 132 U. S., 282, and on the general statement of the doctrine announced in the case of Pembina Con. Silver Mining and Milling Co. vs. Pennsylvania, 125 U. S., 181, that, "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits * * * * arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign."

And, we insist, on the contrary, that such legislation cannot admit such foreign corporations, on the performance of certain conditions precedent, and at the same time deprive such corporations and their creditors of rights of property secured to them by the Constitution of the United States in the Fourteenth Amendment, such rights as has every solvent creditor, by the law of the land. If this be not a proper limitation of the right of the State, they may admit with one hand and deny every substantial right with the other. In such an event, a foreign corporation, on entering a State under such a law, passes beyond the protection of the Fourteenth Amendment. Right of removal of causes to Federal courts in proper case is no more, we insist, a constitutional right, beyond the right of a State to impair by such legislation (170 U. S., 194), than is the right of corporations, when solvent, to dispose of their property, as all other persons and corporations are permitted to do.

In conclusion, we insist that plaintiff in error is entitled, under his second mortgage, to the fund realized from the

sale of the hotel property, as well as the proceeds of the property on which plaintiff in error has the first mortgage, for the reason that the Travelers Insurance Company did not, in the Supreme Court of Tennessee, "specially set up and claim" that the Act in controversy violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, and cannot now set up the same, unless the raising and claiming of same by plaintiff in error would inure to the benefit of said Travelers Insurance Company.

See Assignment of Travelers Ins. Co. in Supt. Ct. of Tenn., tr. 89 et seq.

For all the above reasons, the Supreme Court of Tennessee should be reversed, and decree rendered for plaintiffs in error.

Shields Bros., one of the Tennessee creditors in the original bill below, has conceded the contention of plaintiffs in error, since the decision of Blake vs. McClung, supra, and now makes such concession.

R. E. L. MOUNTCASTLE,
For Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

UPON WRITS OF ERROR TO THE SUPREME COURT OF TENNESSEE.

WILBERFORCE SULLY ET AL.
vs.
AMERICAN NATIONAL BANK ET AL.

WHEREAS, in the original stipulations of counsel as to record to be printed, pages 142-147 of printed record in the Supreme Court of the United States in the above cause, and under stipulation sixteenth thereof, on page 146, occurs this stipulation:

"16th. The assignments of error filed in the Supreme Court of Tennessee. Tr., vol. 6, pages 2025-2038 and 2052-2078." And,

WHEREAS, It was intended by this stipulation to have printed especially, the assignments of error of appellants filed in the Supreme Court of Tennessee from the decree and judgment of that court to the Supreme Court of the United States; and,

WHEREAS, The paging under said stipulation sixteenth calls for only the assignments of error filed in the Supreme Court of Tennessee from the decree of the Court of Chancery Appeals of Tennessee, instead of the assignments of error above set out, by mistake of counsel.

THEREFORE, In order that the matter may be corrected without additional expense in the printing of record, it is hereby agreed on the part of counsel representing parties in the above cause that the assignments of error filed by ap-

pellants on January 20, 1899, and found at pages 2110-2116, 2118-2120, and 2121-2126 of volume 6 of the record in the above cause, now filed in the Supreme Court of the United States, may be printed in the briefs of counsel as provided by Rule 21 of the Supreme Court of the United States, together with this stipulation, and, when so printed, will be taken as a part of the record in the cause, and in full compliance with Rule 21 of the Supreme Court of the United States.

E. C. REEVES, Sol. for Creditors,
S. C. WILLIAMS, Sol.
ROBT. BURROW.
ISAAC HARR, Sol. for K.
DEADERICK & EPPS,
Sol. for Am. Natl. Bank et al
E. J. BAXTER, Sol.
SAMUEL M. ARNELL, Sol.
THAD. A. COX, Sol.
KIRKPATRICK, WILLIAMS &
BOWMAN,
By Jno. H. Bowman, member of firm.
HENRY HUDSON.
WEBB & McCLUNG,
H. H. CARR,
For Travelers Insurance Co.
SHIELDS & MOUNTCASTLE,
For Carhart, Myton, Sully, and others.

No. 266.
Reply Brf. of Mountcastle for Pltf.
FILED
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JAMES H. McKENNEY,
Clerk
Filed April 25, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

WILBERFORCE SULLY, TRUSTEE, ET AL., PLAINTIFFS IN ERROR,

vs.

THE AMERICAN NATIONAL BANK ET AL.

REPLY BRIEF OF PLAINTIFFS IN ERROR, WILBERFORCE SULLY, MRS. MARY P. MYTON, AND ALFRED B. CARHART.

R. E. L. MOUNTCASTLE,
Attorney for Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-25-1900

IN THE

Supreme Court of the United States.

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WILBERFORCE SULLY, TRUSTEE, ET AL.,

vs.

AMERICAN NATIONAL BANK ET AL.

REPLY BRIEF OF PLAINTIFFS IN ERROR, WILBERFORCE SULLY, MRS. MARY P. MYTON, AND ALFRED B. CARHART, TO THE BRIEFS AND ARGUMENTS MADE BY DEFENDANTS IN ERROR.

It is insisted in the brief filed by defendants in error, represented by S. C. Williams, that neither A. B. Carhart, Wilberforce Sully, nor Mrs. Mary P. Myton are citizens of other States than Tennessee. In addition to the argument made upon this question in our original brief, we desire to submit the following considerations:

I.

A. Such citizenship, to wit, "non-residents within the meaning of the act of 1877," as construed by this court in

the case of Blake *vs.* McClung, 172 U. S., is admitted in the stipulation, as before shown. It is no answer to this admission, which is well known to counsel, that the meaning of non-resident, as defined by the act of 1877, was given in the case referred to, as the same counsel were in it as are on briefs filed for defendants in error, and were familiar with that definition, and agreed to that stipulation, as a matter of fact, in order to save going through the record for the purpose of showing all the facts as to citizenship. It is too late now for them to be heard to question the fact admitted in the stipulation.

B. As showing how counsel on both sides regarded residence and citizenship, and how the same were treated from the beginning to the end of this record as identically the same as that held by the court and in the brief of counsel for general creditors in this cause, said brief being filed by Solicitor E. J. Baxter, and there being upon said brief Deaderick & Epps, the counsel who, with E. J. Baxter, filed the original general creditors' bill in this cause, and who are the representatives of general creditors, we quote from brief here filed by counsel for general creditors on page 7 as follows:

"They (referring to plaintiffs in error) are citizens of the State of New York, contracting under the laws of New York, and with the view of having the debt paid at the office of the company in New York."

No point is made in this brief, filed for general creditors *in solido*, that plaintiffs in error or E. C. Manning are not citizens of the State of New York, as agreed in the stipulations.

C. It is further contended by counsel for "certain defendants in error," represented by counsel, S. C. Williams, that they cannot be precluded by their failure to introduce proof

in trial court to negative citizenship of Carhart, Sully, and others for the reason that no question was made in the court below which would call for the relevancy of such proof. This is only a manifest error of said counsel, although nothing is shown as to that in the stipulated record except the use by counsel of the terms "citizenship" and "residence" as meaning the same thing as referred to in our original brief, but as counsel herein for defendants in error has stated that the point was not made in the lower court, we respectfully refer the court to page 1853 of volume 6 of the transcript, which shows that the question as to the violation of the Federal Constitution was made in chancery court in exceptions to the report of the master allowing priority to Tennessee claims, so that if counsel desired then to contest the question of citizenship, as averred and understood between all counsel in the case, as shown in our original brief, opportunity was given and declined.

II.

As to Residence and Citizenship of E. C. Manning, Assignor of Wilberforce Sully.

It is insisted by counsel for "certain defendants in error" that there is no averment or proof of the residence of E. C. Manning. We admit that in the stipulated record no proof nor averments in the general transcript are called for, but it was certainly understood and agreed to in the stipulations, page 177, printed Record, as follows:

"It is further stipulated that neither Wilberforce Sully, trustee; A. B. Carhart, Mrs. Mary P. Myton, nor E. C. Manning proved nor attempted by any evidence to show in what jurisdiction they were citizens respectively. *Each of them* did prove their respective residences to be as indicated above."

Now, the words "indicated above" mean that there are somewhere in the stipulations the residences of these parties set out. On page 144 of the stipulations their residences are set out as New York, except that it says, "Wilberforce Sully, assignee of E. C. Manning, New York."

Inasmuch as the stipulations first call to the attention of the court the fact that the residence of E. C. Manning was shown in the statement, we take it to be conclusive that such residence of E. C. Manning, within the meaning of the act of 1877, as called for in the stipulations, page 144, was New York. But counsel insists that the record not stipulated for shows that E. C. Manning was a resident of the District of Columbia, and that such residence gives no constitutional rights to such party within the meaning of section 2, article IV. If the court went into the original record—which we understand that it has the right to do, but with no obligation resting upon this court so to do—and such is the fact as to the residence of such party—then we insist that under section 2, article IV, such resident is a citizen of another State within the meaning of said constitutional provision, and to protect such a constitutional right of equal privileges and immunities under the laws of the United States the word "State" should be construed to mean all of the States and Territories of the United States. Each party is a citizen of the U.S. within the meaning of Clause 1 Sec. 1. XIV amendment. III.

It is also insisted by counsel for "certain defendants in error" that each of these debts due to the general creditors—Sully, as assignee of Manning; Mrs. Myton, and A. B. Carhart—are not shown in the record to have been contracted prior to the registration of the mortgages. This is true as to the stipulated record, but said debts had been contracted before, as shown in the transcript, and no stipulation in regard to it was made, because so well known to counsel, and no point on the same was made in the brief for general cred-

itors, defendants in error. It is true that in the petition of Mrs. Myton and Carhart setting up their unsecured claims in the chancery court at Johnson City, Tennessee, they set out the date of the note which they held. This note, however, was given in renewal of other indebtedness due from the Carnegie Land Company to said parties which had been taken up, but the date of contraction of the original debts is shown in the transcript as follows, antedating said mortgage registration by four months:

As to Mrs. Myton, Original Transcript, pp. 777 and 780, vol. 3.

As to A. B. Carhart, Original Transcript, p. 779, vol. 3.

Note filed with petition of Carhart and Myton was a renewal of note dated October 26, 1892, as reported by master and unexcepted to.

Original Record, vol. 3, p. 926.

The Manning debt is also shown to have been created before the registration of both of the said mortgages, to wit, on the 22d of March, 1890.

Report of master, Original Transcript, p. 925, vol. 3.

As to Mortgagee A. B. Carhart.

In answer to the proposition advanced in our original brief that plaintiffs in error, Carhart and Sully, trustee, have been deprived of immunities given to residents and citizens of Tennessee under article 2, section IV, of the Constitution of the United States, defendants in error insisted that the act of 1877, chapter 31, does not give to Tennessee mortgagees any immunities not granted to plaintiffs in error, and it is their argument that under said act of 1877 Tennessee creditors have to submit to a priority in favor of all debts contracted to Tennesseeans prior to the date of the

registration of said mortgage or taking of any judgment in favor of such Tennesseeans upon several grounds:

1. It is insisted at page 19 that their construction, which would subject all mortgagees alike, would be more consonant with justice. That argument comes with poor grace, when, if it be true, it would follow that justice would treat alike all resident as well as non-resident citizens, which manifestly was not the view taken by the legislature. If the legislature, therefore, had the idea to make a discrimination in favor of residents of Tennessee as against non-residents and citizens of other States, as they unquestionably did do, why did they not also make and intend to make this discrimination in favor of resident mortgagees as against non-resident mortgagees, which they likewise did, as we insist?

2. The next point contended for is that our construction of said act would make the statute work absurd results, for the reason it is said that the bonds issued upon the mortgage would go out upon the market, and the rights of any holder of said bonds would depend upon the fact as to whether the original purchaser of such bonds was or was not a resident of Tennessee.

This argument is in like position with the other, the act itself making that very inconvenience with respect to all other debts as well as to bonds secured by mortgages or debts secured by judgment. In other words, as to a note issued by said corporation payable to bearer, if presented for payment in the state of such corporation thereafter, the holder of said note, a simple contract debt before being entitled to the status of a Tennessee creditor, would have to prove that the first owner of said paper was a resident of the State of Tennessee, so that this argument of defendants in error comes to nought under the plain language of said act, it being as easy to locate and prove the first holder of bond as of such a note.

3. The third ground insisted on is that there are counter acts of Tennessee which may be looked to in aid of the construction as follows: The act of 1873, by which railroad mortgages, regardless of whether made to Tennesseeans or others, were subordinated to debts antedating and postdating such mortgages, and also the act of 1877, providing that claims for materials furnished and damages done in the operation of the road should have priority over any mortgage issued by such railroad company.

In answer to this we insist that such acts, instead of being an argument for the construction contended for by the defendants in error, are very much in favor of the construction contended for by plaintiffs in error, in this, that the acts of 1873 and 1877 referred to make no distinction whatever between claims of residents of Tennessee and residents of other States or citizens of Tennessee and other States as to priority over mortgage, but in giving a preference over the mortgage the preference is given alike to the claims, having no reference whatever to the residence or citizenship of the claimants. It would therefore make no difference, as no such purpose is manifest in the act to give a preference to Tennesseeans over others, that any construction could be called for making any distinction between the persons who hold the mortgage. In said case the purpose manifestly is to protect the claim regardless of residence or citizenship, while in the act at bar the intention is to protect creditors of Tennessee and not the character of the claim, and the character of the claim has nothing whatever to do with the question. The purposes of the two acts essentially differ—one always discriminating, the other never.

4. The next objection urged is that this court will adopt such construction of said statute as will uphold it as constitutional.

This is true, but where the construction insisted on by counsel makes the act evidently in violation of the constitu-

tion of Tennessee, as shown by the decisions of Tennessee, then the object of this court is to so construe said act as to make it, first, in harmony with the constitution of Tennessee, that being more obviously within the scope and in the mind of the persons passing the act. This court will not grant a construction to make it violate the Constitution of the United States, but in looking at the act, when they find out that the construction insisted on by the other side would certainly make it in violation of the constitution of Tennessee, they will give it a construction which will make it harmonious with the constitution of Tennessee, even if the effect of it is to preserve the rights of the plaintiffs in error in consequence of said act violating the Constitution of the United States.

5. Counsel for "certain defendants in error" next insist that this statute was construed by the State courts to grant the prior lien of the mortgage or judgment against all debts which may have been incurred subsequent thereto, and to deny such priority of lien only (not the debt in its original status) to their mortgages or judgments as respects antecedent debts. This contention of defendants in error works a plain absurdity, and the State courts made no such construction nor determination, and the illustrations given of such application are entirely misstated by counsel. Such contention was not made at the bar in fact, nor does it appear at any step of the proceedings of this case—stipulated record or transcript—and such was not the construction of said act by the court nor by any of the counsel in this case, nor was it insisted on, as is shown by the stipulated record. Such an absurd contention is negatived by the plain language of the statute itself. The language of the act is that "creditors who may be residents of this State shall have a *priority* in the distribution of assets," etc., "to the payment of debts over all simple contract creditors, being residents of any other country or

countries, and also over mortgage or judgment creditors for all debts, engagements and contracts which were made or owing by said corporations previous to the filing," etc. If counsel's contention is correct, the debts due to residents of Tennessee would not have a priority over mortgage creditors, but would simply share with mortgage creditors in the event such mortgage creditors' debts antedated the mortgages taken to secure the same. And in such event the act would read, that creditors who may be residents of this State, etc., should have an equal right to distribution with any mortgage or judgment creditors as to debts contracted before registration of such mortgage, not a "priority" over such mortgage creditor, but the act is otherwise expressly. Again, such a construction would lead to the most fraudulent results if it should be placed upon said act by this court or the courts of Tennessee, and must therefore not be presumed, because if a creditor who takes a mortgage has still the right to share equally with those creditors whose debts antedated his mortgage or judgment, or the judgment taken by him, if his debt antedates his mortgage, as is nearly always the case, every creditor would immediately, as soon as his debt was contracted, either take a mortgage or a judgment, for even if his mortgage or judgment were not valid, by taking it, he would make a class of Tennessee creditors, created before the date of his judgment, in which he would share, and the sooner his judgment was taken the more limited would be the number of such creditors sharing with him.

If this construction had been made by the courts of Tennessee, there would be a number of different classifications not made in said decree:

1. There would be a class who took prior to the registration of the first mortgage.

2. There would be a class who took prior to the registration of the second mortgage.

3. There would be a class between the second mortgage and the first judgment taken, even though such judgment were in favor of a Tennessee creditor; but, as a matter of fact, there only being mortgages in favor of non-resident citizens, the classification was simply made with reference to the mortgages, and no classification was made with respect to the judgments whatever, and nowhere in any of the decrees of the court of chancery appeals or the supreme court has the question as to the time of maturity of the mortgage debts or judgment debts cut any figure or been referred to except in the case of Jarvis, King, and Maden and wife, which present entirely different questions, and will be referred to hereafter.

By reference to the first decree pronounced in the chancery court at Johnson City, Tennessee, it will be seen that the chancellor made the following classes of claims:

1. After the payment of costs, taxes, &c., should be paid "all debts contracted prior to November 23, 1891, and due residents of Tennessee," November 23, 1891, being the date of the registration of the mortgage of the Travelers' Insurance Company on the hotel property, a part of the property of the Carnegie Land Company.

2. "All debts due residents of Tennessee contracted after November 23, 1891, and before February 10, 1893," the latter date being the date of the Carhart mortgage.

3. "Creditors, residents of Tennessee, whose debts were contracted after February 10, 1893," this last class taking without reference to judgments or otherwise, for the reason that, as will be more fully shown, the judgments being in favor of Tennessee creditors, the court either construing said act not to give a preference over such judgments, or else the judgment being taken after the Carnegie Land Company made a general assignment, and after its property

had become a trust fund for creditors, the judgment was of no effect as to creditors of said company or any one else.

4. "Non-residents of Tennessee by simply contract." (Printed Record, Tr., p. 45.)

This decree fixing this classification was not modified by any subsequent decree by the court of chancery appeals or the supreme court of Tennessee.

It will be noted further that no such claim as is made by counsel for "certain defendants in error" is made by counsel for general creditors in this cause. It will now be noted that the judgment in favor of H. C. Jarvis was taken on September 15, 1895. If this judgment in favor of this Tennessee creditor (the other two judgments in favor of King and Maden having likewise been taken after the general assignment was made by the Carnegie Land Company) had the effect the same as the taking of the mortgage in favor of Carhart or the Travelers' Insurance Company, there would have been a decree allowing all creditors whose debts were contracted between the date of the Carhart mortgage, February 10, 1893, and September 15, 1895, the date of the Jarvis judgment, to be paid ahead of any other debts to resident Tennesseeans, after the date of said Jarvis' judgment, and so likewise as to the judgments in favor of King and in favor of Maden and wife. As to the date of the Jarvis judgment, see printed Record, page 80.

This contention of counsel for "certain defendants in error" is made for the sole reason that it is known that the mortgage bonds of Carhart were taken, of course, after the mortgage was registered, although it might have the effect to put Carhart's indebtedness previously contracted in the same class as Tennessee creditors whose debts were contracted previous to that time, which, however, would be in the face of the plain language of said act, but it is insisted by counsel for "certain defendants in error," though not so

insisted by counsel for the general Tennessee creditors, that the court below actually construed said act as claimed by said counsel in the case of H. C. Jarvis, a Tennessee creditor who recovered judgment, as before stated, in 1895, and the quotation is made from the decree of the court of chancery appeals, which, without its context and without knowing the point which was under discussion by the court at the time, would give color to such contention; but when the decree of the court is read as to said claim and the point which was made against said claim is understood, it is manifest that the court was simply passing upon the assignment of error which had been made affecting the priority of said claim as being prior in right to the mortgage of the Travelers' Insurance Company. There is only one assignment of error attacking the decree of the chancellor allowing Jarvis' priority as a Tennessee creditor over the mortgage of the Travelers' Insurance Company, and that was the assignment made by the Travelers' Insurance Company itself.

Transcript, pp. 97, 98.

The Travelers' Insurance Company insisted that the Jarvis claim was not a debt against the Carnegie Land Company at the time the mortgage to the Travelers' Insurance Company was executed, because Jarvis in his cross-bill had only sued, it insisted, for five hundred and seventy-five dollars ($575), and yet a decree was granted him for $2,236.50; that an appeal had been prayed to the supreme court of Tennessee by the Carnegie Land Company, and afterward the appeal was dismissed and an agreed decree entered in favor of Jarvis for the sum of $1,800. It was insisted by the Travelers' Insurance Company that decree, at most, for $1,800 could only be good between Jarvis and the Carnegie Land Company, it being entered September 15, 1895; that the Travelers' Insurance Company was not joined in that case, and therefore could

not be bound. It was further insisted that the Travelers' Insurance Company had more than two years before made a general assignment, and all its affairs were then being wound up under a general creditors' proceeding. It will be borne in mind that it was not insisted that the act did not give Jarvis a right to his claim prior to the Travelers' Insurance Company, provided his debt was created before the time the mortgage was registered, but that the debt then was only $575, and yet the decree was thereafter rendered for $1,800, and was entered after the general assignment of the company, and it was claimed by the Travelers' Insurance Company that the decree was inoperative in fixing the amount at $1,800. In answer to this contention, the court of chancery appeals said that Jarvis purchased lots from the Carnegie Land Company in 1890, which was before the mortgage to the Travelers' Insurance Company; that at that time his right of action accrued on account of the fraud practised against him, which right of action culminated in the judgment for $1,800 after the property of Carnegie Land Company had become a trust fund for its creditors. The court of appeals say it was argued before them that in his cross-bill he only claimed $575. In this connection the court say that the real difficulty is over the contention whether the debt should be treated as of the date of his decree or as of the date of his right to recover. In other words, whether the debt should be for $575 or for $1,800. It was not insisted then by the Travelers' Insurance Company in their assignment of error, nor by the court, that his judgment taken after the general assignment had any effect whatever upon the proceedings; but, on the contrary, the court construed it as simply a question as to what was the amount of the debt, whether the debt fixed by the decree was the true original debt and as such entitled to priority over the Travelers' Insurance Company.

The contention now made by the defendants in error was not made by the Travelers' Insurance Company nor passed

on by the court. As to the case of Frame King, it stands upon exactly the same basis, and on similar exceptions taken thereto the chancellor decided against the King and Maden and wife claims due Tennessee creditors, on the ground that "the rights of the parties were founded on obligations made and entered into after insolvency." The question was whether the claims were created prior to the making of the Travelers' Insurance Company and Carhart mortgages or were the claims created after that. The judgments taken were not factors in either case, they being clearly taken after insolvency.

Dec. of chan., Pr. Rec., p. 44.

This whole matter is treated fully in the decree of the court of chancery appeals.

Pr. Rec., pp. 81, 82, 83.

The court there say that Preas' exceptions to the decree of the chancellor were well taken, on the ground that the Preas debt was created on December 11, 1891, before the registration of either of the mortgages, and that these transactions were all prior to the assignment of June 3, 1893, by the Carnegie Land Company, and that there was no debt created after those mortgages in favor of Preas and King, but that it was the same debt upon which the original liability was based. The fact that judgment was taken after insolvency and that there was a suretyship entered into after the insolvency is expressly here stated by the court to be immaterial.

Pr. Rec., pp. 82, 83.

The same state of facts also exists as to the claims or judgments in favor of Maden and wife. The exceptions made by the Travelers' Insurance Company alone to the report of the master allowing this as a claim as a Tennessee creditor were twofold:

1. That as the land on which Maden and wife claim their lien had been bid in by them at a price which satisfied their claim, they had no claim.

2. That the debt was created after the insolvency of the company, and therefore that the claim was founded upon an obligation entered into after insolvency.

Upon these contentions the court of chancery appeals passed in practically the same way as on the judgments in favor of Preas, King, and Jarvis.

It is also insisted in said brief of counsel for "certain defendants in error" that the construction of this statute contended for by defendants in error would grant to the residents of Tennessee who have reduced to judgment a demand of a foreign corporation contracted with Carnegie Land Company priority over residents of Tennessee. We insist that it would have no such effect, but that it would have the opposite effect, for the reason that a demand of a foreign corporation contracted with a corporation doing business in Tennessee and transferred to a resident of Tennessee would not give priority to such resident of Tennessee, because such resident of Tennessee would take the status of the Virginia corporation, which, under the act of 1877, has no priority whatever. The claim of the Carnegie Iron Company, assigned to A. R. Wing, has no bearing on the question, for the reason that this assignment to A. R. Wing was made after the Carnegie Land Company became insolvent, and Wing, as assignee, was denied a preference for the sole reason that, as assignee, he stood in the shoes of the foreign corporation, which, under the act, had no preference whatever.

It is not insisted by us and it would be ridiculous to say that because the assignee of the foreign corporation happened to be a Tennesseean such Tennesseean would have any different right than such foreign corporation.

VI.

It is next insisted by counsel that there were no resident mortgagees before the supreme court of Tennessee, so as to call from that court any construction of this statute as to their rights and so as to deny privileges and immunities to non-resident mortgagees while granting them to the former. It is true that there were no resident mortgagees before the court, but it is also true that there were non-resident mortgagees and citizens before the court, and that by the enforcement of the act in question these non-resident mortgagees were denied rights and immunities which should have been granted to them under the Constitution of the United States, the said act properly construed denying such privileges and immunities to non-residents while granting the same to resident mortgagees, whether they were before the court or not. The ground on which the supreme court based their holding that plaintiffs in error were not entitled to the benefit of their mortgage is a matter well known to this court from the record in the case of Blake *vs.* McClung. It is true that that record is not evidence in this cause, but the decisions of the supreme court of the State, whether evidenced by duly printed books or by the written opinion or by their decrees, are matters open to and known to all, as matters of enunciated law, and of which all courts will take knowledge when brought before them, not, however, as evidence, but on the other ground.

For that reason it is known to this court that the supreme court of Tennessee decided against plaintiffs in error and all residents and citizens of other States on the ground solely that a State in admitting a foreign corporation to do business in it had the right to place any terms thereon which it deemed proper to impose, and that said court held in the cause of Blake *vs.* McClung, as well as in the cause at bar, that the State had the right to make any discriminations in favor of its own citizens and residents as against citizens

and residents of other States, whether such citizens and residents were mortgagees or simple contract creditors. Said court, being of that opinion and having so decided in this cause, had enforced said act against plaintiffs in error, and it is now the duty of this court, as we insist, to construe said act and to say what are the rights that are given under it to Tennessee mortgagees—whether those rights were determined by the supreme court of Tennessee or not—and when such rights of Tennessee mortgagees are determined by this court to say whether the supreme court of Tennessee in enforcing said act are depriving plaintiffs in error of a privilege and immunity by said act given to residents and citizens of Tennessee. It is not, therefore, a moot question, as insisted by counsel for "certain defendants in error." On the contrary, it may have been unnecessary for the supreme court of Tennessee to decide what right and immunity was granted to resident mortgagees, inasmuch as they excluded plaintiffs in error from participation on the broad ground that the Constitution of the United States in the particulars complained of here was not violated, as the State had the right to do the very act which it did, regardless of what privileges or immunities were granted to residents of Tennessee. The Federal question was passed on by the supreme court of Tennessee when the act was enforced in the teeth of the exceptions made by plaintiffs in error; and even if the supreme court of Tennessee did construe said act against plaintiffs in error—which is not true as to those rights and immunities granted to resident mortgagees of Tennessee—still we insist that this court has the right to make an independent construction of said act for itself, as the supreme court of Tennessee can no more by construction deprive plaintiffs in error of a constitutional right which this court thinks plaintiffs in error have than the legislature has so to do. As was said by this court in the cause of Yick Wo *vs.* Hopkins, wherein

was involved the constitutionality of certain ordinances of the supervisors of the county and city of San Francisco:

"The determination of the question whether the proceedings under these ordinances, and in enforcement of them, are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

118 U. S., p. 356.

In the above case the Supreme Court overruled the construction given said ordinances by the supreme court of California and declared them unconstitutional.

The following cases, we insist, support the contentions of plaintiffs in error:

Raby *vs.* Colchaur, 146 U. S., 153.

Johnson *vs.* Risk, 137 U. S., 300.

XIV Amendment.

IV.

As against the right of Carhart and Sully, trustee under mortgage executed, several points are made by "counsel for certain creditors" before mentioned, which were not fully considered in our original brief:

1. It is insisted that Carhart cannot claim a violation of the constitutional provision providing for the equal protection of the laws, because he was not within the jurisdiction of Tennessee.

Our insistence as to this is that the Carnegie Land Company was a foreign corporation, which having complied with the laws of Tennessee regulating the admission of such corporations into the State, which act declared such corporations, on compliance of certain terms, to be to all intents and purposes a domestic corporation, was within the juris-

diction of the State; and inasmuch as the rights of Carhart, mortgagee, to the security of the mortgage executed by said Carnegie Land Company depends upon the rights of said Carnegie Land Company, a solvent growing concern, to create said debt and to make said mortgage, and therefore as Carhart is in privity with said Carnegie Land Company, he has the right to make the question that the law which undertook to deprive him of his mortgage was a law which violated the Constitution of the United States as to the equal protection of the laws, in so far as it did deprive such corporations of the equal protection of the laws, such corporation being within the jurisdiction of the State of Tennessee. The question here is what right has Carhart and Sully, trustee, been deprived of as guaranteed to their vendor and through it to him under the Constitution of the United States? Said act being void as a violation of said provision of the Constitution as to their vendor, plaintiffs in error, Carhart and Sully, trustee, have the right, they being injured thereby, to have their right adjudicated in this court irrespective of said statute. We insist the following cases, by inference, support the above contention: Brown *vs.* Smart, 145 U. S., 454; Ludeling *vs.* Chafe, 143 U. S., 649. Perhaps the argument submitted in our original brief as to class legislation in this act is more appropriate under the provision of the Constitution providing for the equal protection of the laws rather than under due process of law; but while that is true, aside from the question as to whether plaintiffs in error are within the jurisdiction of Tennessee, we insist that there are certain attributes of classification under the statute which more particularly come within the due process of law guaranty, which may be involved and do not depend on whether plaintiffs in error are citizens of the State of Tennessee, and which are treated in our original brief under the head of "due process of law." As has been said, "a law depriving all persons of a certain form of liberty, or freedom, or contract, &c., would be equal, but the

same would not be constitutional under the due process of law clause."

Guthrie on XIV Amend. to the Con., p. 109.

VII.

It will be observed that the authorities cited by counsel as to insolvent laws have no application to a case of this kind, wherein is involved the constitutional right of parties to make and to take mortgages, the mortgagee being a solvent and going concern. Cases as to the laws regulating insolvents and also as to the regulation of public corporations such as railroads and the payment of employés, where the safety and welfare of the State are involved through a public corporation, have no application to this case. Neither does the regulation of insurance policies, 172 U. S., 562, where the said regulations apply equally to domestic and foreign insurance companies and are reasonable and appropriate as regulations and not oppressive or discriminatory, affect the question here presented. Nor do the mechanic lien cases, such as that in 101 U. S., 443, cited, nor the regulation of railroads, which are public trusts in their nature for the protection of those damaged in person or property in the actual operation of the same, to the benefit of the mortgage or protection of the pledge, affect the doctrine which we contend for, as to the infringement upon the right of contract of a private corporation in this State. Great reliance is placed by counsel on the case in 113 U. S., 515, as to lien for water rents having priority over mortgages, but while it is stated in this case by this court that the mortgagee takes notice of the law existing at the time the mortgage is taken, the decision nevertheless is placed upon the ground that the water rents are for the benefit of the common pledge in the same way as the mechanic's lien. As to taking notice of the law which undertakes to make unconstitutional regulations of the rights of parties, that was distinctly repudiated in the case of Blake

vs. McClung, the court saying that citizens of other States were not precluded because they contracted with notice of the law which gave Tennessee creditors an immunity and privilege not granted to them.

It is contended by opposing counsel that in the event Carhart succeeds and the Travelers' Insurance Company fails in securing priority for their mortgages, Tennessee creditors are still entitled to priority over Carhart's mortgage because said mortgage on the hotel property was taken subject to the Travelers' Insurance Company's mortgage. We insist that it is mere sophistry to say that the act, unconstitutional as to Carhart's mortgage, is yet effective so as to deprive him of it by virtue of the self-same act. The situation is this, as we see it: Carhart's lien is good against everybody, if the act is unconstitutional, because:

1. The Tennessee creditors lose their priority under the act.

2. The Travelers' Insurance Company in such an event, and if the act is good as to it, has no right it can make effective in this case and in this court as against Tennessee creditors or Carhart.

It is the same as if the Travelers' Insurance Company's mortgage were invalid or paid off and discharged so far as every one in this court is concerned. Certainly the Tennessee creditors cannot hold up the Travelers' Insurance Company's mortgage as a shield against Carhart's rights when said mortgage is dead in its owner's hands.

Respectfully submitted.

R. E. L. MOUNTCASTLE,
Attorney for Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

No. 266.
Br. of Baxter for Def'ts.

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JAMES H. McKENNEY,
Clerk.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 266.

Wilberforce Sully, Trustee; Wilberforce Sully in his own right, Alfred B. Carhart, Mrs. Mary P. Myton and The Travelers' Insurance Company, Plaintiffs in Error,

versus

The American National Bank et al.

Reply Brief, on Behalf of The Defendants in Error, The American National Bank, Shields Bros. and Scioto Star Fire Brick Works.

E. J. BAXTER,
Sol. for Defendants in Error.

DEADERICK & EPPS,
E. J. BAXTER, of Counsel.

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versus

The American National Bank et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR. THE AMERICAN NATIONAL BANK ET AL.

A statement of the case is fairly made by appellants in their briefs, and further mention will not be made except by reference to the record in argument.

Plaintiffs in error, seek a re-examination, by this court, of the decree rendered by the Supreme Court of Tennessee upon the ground that the Act of the General Assembly of Tennessee passed March 19, 1877, being chapter 31 of said Acts, is

unconstitutional, as being in violation of Section 2 of Article 4 of the Constitution of the United States, which is as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

And of Section 1 of the 14th Amendment to the Constitution of the United States which is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of Tennessee held, that the Act of 1877, Chapter 31 of the General Assembly was not in controvention or violation of either of the Articles of the United States Constitution, as above quoted.

The defendants in error, The American National Bank, Shields Bros. and Scioto, Star Fire Brick Works, filed a bill in behalf of themselves and all other creditors of the Carnegie Land Company, under and in pursuance of the Statute of 1877, which Statute had been sustained by the highest Court of the State prior to the filing of this bill and prior to the execution of any of the contracts sought to be enforced.

The various courts of the State sustained their contention in this instance, and the assets of the corporation were decreed to be distributed in accordance with the provisions of that Act.

Record page 47.

The bone of contention in this case is the distribution of assets amounting to $66,123.31.

Record page 145.

The amount decreed to creditors resident in Tennessee was $29,377.36 as having accrued prior to Nov. 23, 1891, the date of registration of the Travellers' Insurance Company's mortgage.

$13,794.35 accrued after Nov. 23, 1891 and prior to Feb. 10,

1893, the date of registration of the mortgage to Wilberforce Sully, trustee.

$1,860.97 accrued after Feb. 10, 1893.

Record page 144.

$35,406.19 was due The Travelers' Insurance Company, a corporation of the State of Connecticut, and was secured by a mortgage registered Nov. 23, 1891.

$105,124.99 was due Wilberforce Sulley, trustee, and A. B. Carhart residents of New York, and was secured by mortgage registered Feb. 10, 1893.

Record page 144.

The total indebtedness of the Carnegie Land Company was $271,321.55.

Record page 145.

The decision of the highest court of a State, that a statute is not in conflict with the Constitution of the State is conclusive upon all the courts of the United States and will not be reviewed by them. But, if the ground of invalidity urged against the statute is, that it contravenes the Federal Constitution, or an Act of Congress, the Federal Courts will not be bound by the decisions of the State Courts.

Atlantic & G. R. Co. v. Georgia, 98 U. S. 359.
Louisiana v. Pillsbury 105 U. S. 278-294,26 L. ed. 1090-5.

It is urged with equal emphasis, that the validity of an Act of Congress may be passed upon by the State Courts, until it has been settled by the Supreme Court of the United States.

Lent v. Tilson 140 U. S. 316.

The statute of 1877, ch. 31 having been declared by the Supreme Court of the State to be a valid enactment, since the date of its passage, and creditors resident within the State have contracted with the Carnegie Land Company under said statute and with reference to the provisions thereof.

Non-resident creditors contracted with this corporation, with notice of this statute, and under its terms and provis-

ions. The laws enacted by the General Assembly of a State are for the public good and all are presumed to know them.

Will this Court say, although there has been a well established precedent as to the validity of the statute, that resident creditors must yield their rights? Would not such reasoning create a more serious interference with the property rights of the Tennessee creditors than would be remedied by giving new property right to non-resident creditors, who had not contracted for them under the statute?

Where state decisions establish a rule of property rights, this Court, if it is possible to do so, will adopt and follow the settled rule of construction affixed by the State court of last resort, to the statute law of the state. And this rule obtains whether the decision of the highest court of the State declaring the validity of the statute was delivered before or after the property rights have attached.

Burgess v. Seligman 107 U. S. 20-34: 27 L. ed. 359-365.
Miller v. Ammon, 145 U. S. 423: 36 L. ed. 761.
Warburton v. White (No. 101) decided by this Court Feb. 26, 1900.

The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under and in pursuance of the Act are concerned. Their validity and obligation can not be impaired by any subsequent decision altering their construction.

This doctrine applies as well to the construction of the organic law, as to the construction of a statute.

Louisiana v. Pillsbury 105 U. S. 278-294: 26 L. ed. 1096.
Douglass v. Pike Co. 101 U. S. 686.

A mortgage given upon property situated in Tennessee, by an insolvent corporation doing business in said State by legislative permission, securing non-resident creditors, which, when foreclosed as was intended at the time, by the party executing the mortgage, would result in defeating bona fide creditors, will be controlled by the laws of the State of Tennessee in determining the rights of the parties thereunder.

Etheridge v. Sperry, 139 U. S. 276-277: 35 L. ed. 176.
Purifier Co. v. McGroarty 136 U. S. 241; 34 L. ed. 348.

The Travelers' Insurance Company came into Court and submitted its case upon the contract it had made with The Carnegie Land Company as it stood under the decision of the State Court.

It did not raise any question in the lower court against the validity of the statute under which it had contracted, on the Constitutional question here urged, and having failed to make that defense against the statute in the lower court, it will not be permitted to raise the question for the first time in an appelate court.

The question must be presented to the court below and be decided adversely to plaintiff in error before this court will have jurisdiction.

Church v. Kelsey 121 U. S. 282: 30 L. ed. 960.

In order to give this Court jurisdiction of a writ of error to review a judgment of the highest Court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have have been specially set up or claimed at the proper time and in the proper way

If it was not claimed in the trial Court, and therefore, by the law and practice of the State, as declared by its highest Court, could not be considered by that Court; or if it was not claimed in any form before judgment in the highest Court of the State, it can not be asserted in this Court."

Morrison v. Watson, 154 U. S. 115: 38 L. ed. 929.

It is the well settled law in the State of Tennessee that unless questions are specifically raised by the pleadings in the lower court the appellate or Supreme Court will not permit it to be raised for the first time in that court.

The failure of a party to raise the objection below is fatal and he can not claim protection under the objections made by another party to the record.

Campbell v. Railroad, 98 Tenn. 126.
Denton v. Wood, 86 Tenn. 37.
Rule 29 of Supreme Court, 85 Tenn. 737.

Does the statute of 1877, as complained of, take away fundamental right and exclude a judicial inquiry of liability? Certainly not.

It has made no contract for the parties, and seeks to make none.

The statute simply prescribes what may be done, and if a non-resident seeks to come into a State and contract with a resident of that State, he is presumed to do so with full knowledge of the requirements of the statute. Risk, therefore, can only come from his failure to observe due care, such care, as might be supposed without promptings from the law.

The Carnegie Land Company was a non-resident corporation, incorporated under the laws of Virginia, but doing business in Tennessee, by Legislative authority. The authority of the corporation was, therefore, statutory, and it could not, execute a preferential trust or mortgage in violation of its statutory authority. This is elemental.

Purifier Co. v. McGroarty 136 U. S. 237: 34 L. ed. 346.

It is the law of Tennessee, of long standing, having been so declared by the Supreme Court of the State, and under such statutory conditions, all contracts are made, and property held.

Such discretion is reasonable, not oppressive or discriminatory, so as to render it subject to constitutional objection.

Whatever a State may do with corporations of its creation it may do with foreign corporations admitted into the State.

Hooper v. California 155 U. S. 648: 39 L. ed. 297.
Insurance Co. v. Doggs decided by this Court January 16, 1899.

A legislative enactment is the law of the State and must be controlling upon corporations and citizens of the State with respect to their rights to acquire property and to enter into contracts.

Such legislation is reasonable and no abridgment of the Federal Constitution.

The parties seeking relief in this court upon the theory that the Act of the Tennessee Legislature (1877 ch. 31) is uncon-

stitutional in that it deprives them of property without due process of law, are non-residents of Tennessee.

In so far as the question involves the rights of Plaintiff in Error, The Travelers' Insurance Company, a Connecticut corporation, it needs no further discussion here since the deliverance of this Court in BLAKE v. MCCLUNG 172 U. S. 239.

In that case the Court says: "A corporation of another State can not invoke the Constitutional guaranty of equal privileges and immunities of citizens in case of discrimination against it in favor of the residents of a State in respect to participation in the assets of an insolvent corporation."

Blake v. McClung 172 U. S. 239: 43 L. ed. 432.

If creditors, non-resident of Tennessee, insist upon the unconstitutionality of the Act of 1877 ch. 31, and claim an equal distribution in the assets of a foreign corporation being wound up under a general creditor's proceeding in the State Court of Tennessee, the spirit of the law governing their fundamental right would require them to show equal rights and privileges with the Tennessee creditors.

Has this been done?

(1) They are citizens of the State of New York contracting under the laws of New York and with a view of having the debt paid at the office of the company in New York.

(2) The Carnegie Land Company was a foreign corporation and the State had a right to make reasonable restrictions and limitations.

(3) Wilberforce Sully, trustee, was the treasurer of the Carnegie Land Company and knew of its financial condition at the time of the issuance and sale of the bonds to A. B. Carhart and of the execution of the mortgage to secure same. And the Bonds and Mortgage referring to each other, would give the holder and owner of them full notice of all existing equities.

(4) The mortgage to Sully was made expressly subject to the terms of a prior mortgage and in recognition thereof and to that extent must abide the fate of that mortgage.

The policy of the law is to secure resident creditors of a foreign insolvent corporation as against foreign creditors as to the assets within the State.

May v. First National Bank 122, Ill. 551.
Woodward v. Brooks, 128, Ill. 222.

The above principle may well be doubted as the correct principle of equity in a commercial country, if the Constitutional theory of the government is such that it fosters the free and untrammeled commercial relationship between the different States of the Union.

If that theory be correct, State lines should place no limitations or restrictions upon the full and complete enjoyment of that guaranty.

Any other view would place a premium on provincialism and retard interstate and international comity.

But, every State owes protection to its own citizens and when non-residents deal with them it is a just and legitimate exercise of authority to hold and appropriate any property owned by non-residents to satisfy the claims of its citizens.

Brogg v. Gaynor. 85 Wis. 468.
Penoyer v. Neff. 95 U. S. 714.

If, therefore, the equitable maxim of equality is equity, is sound doctrine in fundamental principle, before the plaintiffs in error in this particular case can claim that constitutional guaranty, they must show equality of fundamental right, and this is not done under the facts of this record.

A contract made in one State to be performed where made, is governed by the laws of that State, notwithstanding the obligation may be secured by a real estate mortgage in another State.

Pingree on Mortgages Sec. 795.
Cope v. Alden 53 Barb. 352.
Mills v. Wilson 88 Pa. 118.
Chase v. Daw 47 N. H. 405.
Story on Conflict of Laws, Secs. 243-4, 272, 287.
Cope v. Wheeler 41 N. Y. 306.
Pritchard v. Norton 106 U. S. 124.
Cogbland v. R'y Co. 142 U. S. 112.; L. ed. 954.

The very debt which Wilberforce Sully, trustee, is seeking to collect by this proceeding is a New York contract debt secured by a mortgage in Tennessee and the very terms of the mortgage make the payment of his debt subject to the payment of The Travellers' Insurance Company's mortgage.

Having contracted that way, and pleaded that way in reliance upon his mortgage, if he has a status in court it must be based upon the terms of his mortgage contract and his debt would only be good and his lien take effect from the date of registration of his mortgage, to-wit: Feb. 10, 1893.

The reasonableness of the rule can be seen at a glance; a corporation organized in another State, locates its plant in Tennessee contracts and is contracted with by the residents of Tennessee while the Treasurer of the corporation is yonder in the metropolis of the country issuing bonds against the corporation for more than the value of the entire plant, and a mortgage is executed to the treasurer as trustee to secure the bonded indebtedness. The mortgage is put to record and all the resident creditors of the State are defeated.

Reverse the rule: The Legislature enacted the law of 1877, which is notice to the world of the rights and privileges of resident Tennessee creditors, and the man or corporation in a foreign State must inquire as to the nature of his security which is only the natural thing for a cautious business man to do.

The court will enforce the contract made by the parties and in doing so keep within the purview of the 14th Amendment to the Constitution of the United States.

A suit in equity to establish a trust in the legal holder of the title to property is "due process of law," within the meaning of the 14th Amendment.

Church v. Kelsey 121 U. S. 282:30 L. ed. 960.

Where a corporation or citizen of one State contracts with a corporation or citizen of another State, and secures his note or bond by a mortgage upon corporate property, the debt and the mortgage as incident thereto will be enforced unless it is against public policy or in violation of the constitution.

Courts will not make, alter or modify the terms of a contract.

The holder of the debt and the mortgage have acquired property rights, and property within the meaning of the constitution, includes contracts necessary for its enjoyment, protection, use, and disposition.

Protection of property includes within it, necessarily, protection of its mortgagee in all the incidents of his contract security.

Coal Co. v. People, 22 L. R. A. 340; 147 Ill. 66.
Frorer v. People, 16 L. R. A. 492; 141 Ill. 171.
People v. Gilson, 109 N. Y. 389.

It is an inherent and inalienable right to make contracts.

Leep v. St. Louis, 23 L. R. A. 204.

Under the Constitution and under the construction given to such contracts by the courts these rights are property rights, and under the 14th Amendment will be preserved and protected, therefore, the property rights of the mortgagees, plaintiffs in error, were fixed by the registration of their mortgages and they were justly entitled to and can claim, under the Act 1877 ch. 31, payment of their respective mortgages, in the order of their registration—payments being made out of the proceeds of the property covered by the mortgages and after all debts and contracts prior to such registration have been removed.

The right to make such contracts is one the of attributes of property, and to deprive a person of that right is depriving him of property within the meaning of the Constitution.

Re. Jacobs, 98 N. Y. 98.
American Reports, Vol. 50. page 636.

This is a fundamental right, brought to this country by its Pilgrim Fathers and wrested from time to time, in the progress of history, from the sovereigns of the English nation.

It can not be denied that the parties claiming under The Travelers' Insurance Company's mortgage are entitled to a lien from the date of registration of its mortgage.

The lien of the Sully-Carhart mortgage would date from its registration.

The parties were in a position at that time to frame their contracts and to bind themselves, subject only to the general laws forbidding those contracts which are immoral and illegal.

State v. Loomis, 21 L. R. A. 789.
Bertholf v. O'Reilley, 74 N. Y. 515.
52 American Rep. 34.
Cooley Const. Lim. 6th ed. 431.
San Mateo Co. v. Southern P. M. Co. 13 Fed. Rep. 145.
Slaughter House case, 111 U. S. 746: 28 L. ed. 585.

These are private rights, and "due process of law" is that course of legal proceedings according to the rules and forms of law which have been established for the protection of private rights.

Davidson v. New Orleans, 96 U. S. 103: 24 L. ed. 619.
Westervelt v. Gregg, 12 N. Y. 209.
Munn v. Ill., 94 U. S.: 113: 24 L. ed. 77.

The General Assembly of any State has the power to prescribe the terms upon which a foreign corporation may enter within its territory for the purpose of conducting its business, but that power is limited by Sec. 2 Art. 4 of the Constitution of the United States.

The State can not pass a law to defeat a vested right, or impair such a right, under due process of law.

Plaintiffs in Error in this case had no rights to be defeated or impaired until their contracts were completed in the registration of their mortgages and by registering a mortgage they could not defeat a prior vested right under the Constitution and laws of the State.

In the free exercise of the privileges and immunities granted to citizens of the several States by the Constitution, these mortgagees perfected their rights and it would be no infringement upon such a right under the supreme law of the land to compel them to stand upon their rights as thus contracted without any interference with the statutory law of the State as to rights accruing thereunder prior to the mortgagee's contract.

Such an interpretation of the law is both reasonable and just and can not be declared hostile to the fundamental rights guaranteed to the citizens of the several States.

There has been no interference with or impairment of a fundamental right granted or secured by the 14th Amendment to the Constitution of the United States.

Slaughter House Cases 83 U. S. : 21 L. ed. 394.
Presser v. Ill. 116 U. S. 252: 29 L. ed. 615.

Magna Charta, Article fifty six declares: "No free man shall be taken, or imprisoned, or disseised, or outlawed, or banished, or anyways destroyed, nor will the King pass upon him or commit him to prison, unless by the legal judgment of his peers, or, by the law of the land."

This great and wise statement has always been regarded as the great safeguard of liberty and has been incorporated, though not in the same language, in every American Constitution.

"Due process of law" or "the law of the land" being the more familiar expression to us, but these expressions are exactly equivalent in import.

Davidson v. New Orleans, 96 U. S. 97.

While that ancient, significant and historical interpretation of these words is of value, it is not exclusive; as centuries are numbered even the foundations of liberty may be modified.

For courts to determine otherwise would be to deny every quality of the law but its age and render progress and improvement, not only unnecessary, but impossible. The very fountains of justice are not exhausted, and new and varied forms of experiences may shape this honored declaration into new but not less useful forms,

Hurtado v. California 110 U. S. 516: 28 L. ed. 232.

As to the language taken from Magna Charta and incorporated into the Constitution, after all has been said, it was only intended to secure and protect individuals in the enjoyment

of the established principles of private rights and distributive justice.

Leeper v. Texas, 139 U. S. 462; 35 L. ed. 225.

In judicial proceedings, "due process of law" or "the law of the land" requires that the party shall be properly brought into court, and when there, shall have the right to set up any lawful defense to any proceeding against him.

There is no judicial proceeding in this case depriving any of the parties of property rights under the legislative enactments of the State, but a judicial declaration of these rights as they existed by contract.

Record, page 87.

The question of "due process of law" as contained in the 14th Amendment to the Constitution of the United States does not mean by judicial proceeding, and is foreign to the issue here.

McMillan v. Anderson 95 U. S. 37; 24 L. ed. 335.
Kelley v. Pittsburg 104 U. S. 78; 26 L. ed. 658.

"Due process of law" in a State is regulated by the law of that State.

Walker v. Sauvinet 92 U. S. 90; 23 L. ed. 678.

The law of Tennessee having been declared by the Supreme Court of the State, we insist that it is in harmony with the "law of the land."

The Supreme Court of Tennessee in passing upon the question say: "A statute is the law of the land" which embraces all persons who are already or who may thereafter come into similar situations, conditions, and circumstances"

Henley v. State, 98 Tenn. 698, and authorities cited.

This is not class legislation, there is nothing vicious nor forbidden in it. It applies equally to corporations and individuals that are or may put themselves into like situation or circumstances, and is therefore a natural and reasonable

classification which meets the requirements of such legislation.

Railroad v. Harris, 99 Tenn. 705, citing authorities.
Cooley Const. Law, 249.
Hayes v. Missouri 120 U. S. 68; 30 L. ed. 578.
Maryland v. Broadbelt, 45 L. R. A. 486, citing numerous authorities.

It was recently held by this Court, "that a statute permitting an attachment against a non-resident debtor without a bond, while requiring a bond for an attachment against a resident debtor, does not constitute a denial to the non-resident of the equal protection of the law, because it was within the power of the legislature to divide debtors into two classes—non-resident and resident—and when so classified, to prescribe different methods of proceeding against them."

Central Loan and T. Co. v. Com. Co., 173 U. S. 84; 43 L. ed. 623.

Again it is insisted that plaintiffs in error failed to avail themselves of their constitutional right to invoke the aid of this Court by failing to raise this Federal question in the Chancery Court where the cause was first heard. And Wilberforce Sylly, trustee, A. B. Carhart, Mary P. Myton and E. C. Manning failed even to raise the question of the unconstitutionality of the Act in the Supreme Court and it is raised here for the first time by them.

Under the rules of this Court they have not put themselves within its jurisdiction. And under the rules of the State Court, all questions must be fairly raised and presented, and relied on by all the parties in the lower Court in order to claim the benefits of a reversal in the Appellate Court. This rule is true, even upon exceptions to a Master's Report under a valid decree, unless the exception is specifically made and relied on it is beyond the control and revisory power of the Appellate Court.

"This is so, though the defendants affected be infants and the report erroneous upon the proof."

Allen v. Shank, 90 Tenn. 377.
Henley v. State, 98 Tenn. 689.
Pollard v. Wellford, 99 Tenn. 114.
Gribble v. Wilson, 101 Tenn 616.
Enc. Plead and Prac., Vol. 8, page 287 et seq.

This court has held in numerous instances that if a party in the statement of his own claim, does not disclose a Federal question, he does not create jurisdiction by anticipating what some other party to the record claims or may claim. And the mere suggestion by a party in his pleading that a State statute is void because in contravention to the Constitution of the United States, is insufficient to give jurisdiction.

Florida Cent. & P. R. Co. v. Bell, decided February 26, 1900, and reported in advance sheets under date of March 15, 1900, at page 402.

The attention of the Court is called to the fact that Complainants in Error have wholly failed to place themselves within the rule giving the Court jurisdiction upon the Federal question urged by them.

(1). They failed to raise the question in the trial court.

(2). It can not be raised for the first time on appeal. Shelby County v. Bickford, 102 Tenn. 395.

(3), When raised for the first time in the Court of Chancery Appeals was not specified, but was too general, vague and indefinite to bring it within the rule.

The language of the exceptor being: "7. By writ of error, complainant excepts to that part of the decree which holds the Acts of 1877 and 1891 constitutional, and thus giving Tennessee creditors' debts previously contracted, priority." The Judges cases, 102 Tenn., 511, citing with approval, State v. Henley, supra.

(4) The exception as above quoted was only made by complainants Carhart and Sully, Trustee, and in the Appellate Court, Carhart, alone filed exceptions based upon that exception.

Rule 29 of the Supreme Court of Tennessee 85 Tenn. page 757, is as follows:

"In all civil causes on the dockets of this Court in the several grand divisions of the State * * * and in all causes hereafter appealed or on writ of error to this Court, it shall be the duty of the appellants or plaintiffs in error, their attorneys or solicitors, to file on or before the first day of the term to which appeals have been or may hereafter be taken, or are

triable, specific assignments of error to the rulings of the courts below, as well as to errors of fact, pointing out definitely the error or errors complained of, and citing in the most concise manner the specific testimony relied upon, designating page of record" &c.

"If this rule is not complied with the judgment or decree will be affirmed, unless strong and sufficient reasons are shown for the failure."

"Errors not embraced in assignment will be treated as waived."

Rule 29, supra.

It is proper to say that one of the complainants in the original bill, Scioto Star Fire Brick Works, is a corporation organganized under the laws of Ohio, and this original complainant does not stand in the same attitude as the other complainants.

It was not contended in the court below, nor is it contended here, that its rights are equal with the rights of the other complainants.

The decree of the court postponed the payment of its debt in the order hereinbefore mentioned.

The claim of Shields Bros., another one of the original complainants, was for a very small sum, to-wit, about $150.00, and this party has informed us by letter that he does not desire to prosecute his contention in this court, as the amount of his claim would not justify such action on his part.

This refusal, however, on the part of Shields Bros is not intended to be construed as, in any way, conceding the contention of plaintiffs in error, and such contention is not now conceded.

The law of Tennessee having been declared by the Supreme Court of the State, we insist that it is in harmony with "the law of land." And submitting the question of jurisdiction in this Court as well as the equality of fundamental rights under "the law of the land," we ask for an affirmance of the decree.

E. J. BAXTER, Sol for Defendants in Error.

DEADERICK & EPPS,

E. J BAXTER, of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILBERFORCE SULLY, TRUSTEE, ET ALS.,
V.
AMERICAN NATIONAL BANK, ET ALS.

No. 266.

BRIEF IN BEHALF OF CERTAIN OF THE DEFENDANTS IN ERROR, WHO ARE CREDITORS RESIDING IN THE STATE OF TENNESSEE.

STATEMENT OF CASE.

The writ of error in this cause is sued out to attack Tenn. Act 1877, Ch. 31, Sec. 5, as unconstitutional, in behalf of two distinct classes of creditors of the Carnegie Land Company; to-wit: (A) Creditors who are general unsecured claimants, asserting rights in conflict with those asserted by the other class; to-wit: (B) Creditors who claim under two separate mortgages, the Travelers' Insurance Company, a body corporate with *situs* in the State of Connecticut, and A. B. Carhart, a resident of the State of New York.

The Travelers' Insurance Company is the adjudged owner of the indebtedness of $35,406.10 secured by its debtor, the Carnegie Land Company, by a deed of trust to the Connecticut Trust and Safety Deposit Company, of Hartford, Connecticut, as Trustee, upon the property (real and personal) known as the Hotel Carnegie property, in Johnson City, Tennessee. Said trust conveyance was registered Nov. 23, 1891: Petition, Rec. 34; Stipulation, Rec. 144.

It will be noted that, while the said Trustee is made a party to the record below, it is not made a party *in anywise* to this writ of error.

The said A. B. Carhart is the adjudged owner of $85,000.-00 of bonds, (aggregating, with accruals of interest, $105,-124.99) secured by a mortgage or trust deed, to Wilberforce Sully, as Trustee, upon the above mentioned Hotel Carnegie property, subject to the above recited mortgage securing Travelers' Insurance Company, and also upon certain other realty of Carnegie Land Company not covered by the mortgage securing that Insurance Company.

The mortgage to Wilberforce Sully, Trusustee, was registered February 10, 1893: Stipulation, Rec. 145.

An error in the statement by plaintiffs in error is: That A. B. Carhart raised the constitutional "questions now involved in the *lower courts* and in the Supreme Court of Tennessee." The facts are that these questions were raised for the first time in an appellate court—the Court of Chancery Appeals, *after a limited appeal* from the lower court, upon writ of error by said Carhart, directed by the appellate court to Chancery Court at Johnson City: Bill of Carhart, Rec. 14; Petition, Rec. 36; Opinion, Rec. 69.

It is admitted that A. B. Carhart, in his capacity of complainant-mortgagee only, raised the constitutional questions before disposition of the cause on appeal, but it is denied that he raised the questions otherwise, or prior to appeal. The immunity was not set up in the trial court: May, Supreme Court Practice, 92; 123 U. S., 181; 153 U.S., 538; 160 U. S., 646.

There being two distinct classes among the plaintiffs in error—general unsecured creditors and mortgagees—these defendants in error will first reply to the errors assigned in behalf of the general unsecured creditors.

BRIEF AND ARGUMENT.

A.—RIGHTS OF GENERAL CREDITORS.

The plaintiffs in error, A. B. Carhart, Mrs. Mary P. Myton, and Wilberforce Sully, as assignee of the claim of E. C.

Manning against the Carnegie Land Company, it is apparent, can only hope to recover out of the assets in event the mortgages aforesaid fail in the maintenance of the liens of their respective mortgages. The mortgage debts aggregate, as has been seen, above $140,000.00, while the entire assets produced a fund of only $66,123.31: Stipulation, Rec. 145.

I. PRIVILEGES OF STATE CITIZENSHIP.—These particular plaintiffs in error assign as error that Act 1877, Ch. 31, Sec. 5, is unconstitutional under U. S. Constitution, Art. IV, Sec. 2, because said Act, while giving the privilege as to priority of satisfaction out of the Carnegie Land Company's assets to residents of Tennessee, denies a like privilege to them as citizens and residents of the State of New York.

Said Section 5, is as follows: "The (foreign) corporations and the property of all corporations coming under the provisions of this Act, shall be liable for all debts, liabilities, and engagements of said corporation, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

(a) *Are these plaintiffs in error "citizens?"*—It is agreed that none of these persons attempted to prove in what jurisdictions they were *citizens*, respectively: Rec. 147. It further appears that none of them *in pleading*

averred *citizenship* in any State of the Union: Rec. 14, 36. It does appear that A. B. Carhart and Mrs. Myton, (not E. C. Manning) in pleading averred, and in proof showed, their place of *residence* to have been the State of New York.

The adjudication made in the case of *Blake v. McClung*, 172 U. S. 239, is referred to as conclusive of the status of plaintiffs in error as to citizenship. The records in that case and in the one at bar are by no means identical, in respect to this matter. In the case of *Blake v. McClung*, the *pleadings* of the prevailing plaintiffs in error, filed in the Chancery Court, stated "that they were residents of Ohio, engaged in business in that State, their residence, offices and places of business being at the city of Cincinnati, *and they were citizens of the United States and not citizens of Tennessee.*" It further appeared to this Court that "*no question has been made* in the State Court that the individual plaintiffs in error were not citizens." 172 U. S. 246.

In the case at bar it appears from the record that these plaintiffs in error in pleading did not aver citizenship in New York, citizenship of the United States, or non-citizenship in Tennessee. Further and especially, these plaintiffs in error did not, in the Chancery Court at Johnson City, make any averment or raise any question *as to citizenship or constitutional right depending thereon, respecting which any proof would have been applicable.* To put it otherwise: there was no issue that would have made proof of the citizenship, as contradistinguished from the residence, of plaintiffs in error, relevant. If, *during the entire proof-taking time*, no such question was made, can it in fairness be said that the parties treated proof of residence equivalent to proof of citizenship? If an inference is to be drawn it will be one of fact, one of a probative fact, and such proof or inferences of probative facts can only arise under an issue to which they can be referable. Will this Court go further than it did in *Blake v. McClung* and rule that without any sort of question, depending for solution upon proof of citizenship, being raised or pleading otherwise, in the only court of proof,

and without proof of citizenship, the presumption will be indulged in this Court that a resident of New York was a citizen of that State, touching a right that inheres in citizenship?

The question has been answered by this Court: "The averment that a party resides in a particular State does not import that he is a citizen of that State (cases cited). *Upon like grounds* the jurisdiction of this Court to re-examine the final judgment of a State Court cannot arise from mere inference, but only from *averments so distinct and positive* as to place it beyond question that the party bringing a case here from such court *intends to assert a Federal right:*" Stave Company v. Butler County, 166 U. S. 655.

The record clearly distinguishes this case from *Blake v. McClung* in this respect. If proof without proper pleading will not support a decree in equity, it would seem that lack of both pleading and proof as to this point will not support a jurisdiction thus distinctly restricted by this Court.

That this constitutional question was raised by Carhart in the Court of Chancery Appeals, under a writ of error specially *sued out for that sole purpose*, is clearly shown by the opinion of that Court: Rec. 69.

There should be no inference of fact indulged against defendants in error on a question that was raised after the time for taking proof was past: May, Sup. Ct. Prac., 92.

But it is argued that the stipulation of counsel states that plaintiffs in error were "non-residents of Tennessee *within the meaning* of Act 1877, Ch. 31;" and that, as this Court in another case (*Blake v. McClung*) construed the word "resident" to be the equivalent of "citizen," this stipulation amounts to an agreement that certain of plaintiffs in error are citizens of New York.

There are three answers to this unique contention: (a) An agreement that a person is *not a citizen* of Tennessee, *but is a resident* of New York (Rec. 147) is by no means an admission that he has a constitutional status of a *citizen of New York.* (b) It will not be inferred that a decision in

Blake v. McClung (December, 1898,) sheds light upon the record in this cause, the final decree in which was passed by the Supreme Court of Tennessee in November, 1898, or upon an undated stipulation respecting said final decree. (c) It plainly appears that the counsel of defendant in error did not mean to admit that the citizenship of plaintiffs in error was proven. They caused the insertion of a later clause which set forth that no attempt was made to establish the *citizenship* of said persons: Rec. 147.

If the construction is placed upon the stipulation contended for by plaintiffs in error, it will be against the real intent of the defendants in error; by a play on words taken from an opinion in a cause to which they were not parties, as to which some of them and their counsel, at least, were in ignorance. The stipulators were ten in number: Rec. 147.

(b) *As respects E. C. Manning (and his claim), there is failure to show even residence.*—The claim of E. C. Manning amounts to about $46,000.00, and its *status* is a matter of no inconsiderable moment. This claim was transferred to Wilberforce Sully, pending the litigation in Chancery Court at Johnson City.

(1.) There appears in the record no *averment by pleading* that E. C. Manning is either a resident or citizen of any particular jurisdiction.

(2.) There is no proof or admission respecting the residence or citizenship of said Manning. It is admitted in the stipulation that the residences of the parties in interest are as therein indicated. It is indicated that Wilberforce Sully, *assignee* of said Manning, is a resident of the State of New York, but nowhere is the residence of the *assignor* indicated. This failure to show in the Agreed Record the residence of Manning was not accidental. If permissible, under the rules of this Court, to look to the full transcript of the record in this Court, and beyond the printed record, it will be found that the report of the master in equity, confirmed by the chancellor, contained this find-

ing in reference to said E. C. Manning claim: "XI 5. Wilberforce Sully, a resident of New York, debt by judgment in favor of E. C. Manning, of Washington, D. C., assigned by said Manning to said Sully, $46,577.15."

Thus, if we look only to the printed record, it contains neither averment nor proof of the residence, (not to mention citizenship,) of Manning. If we look beyond to the transcript, it is found that Manning was a resident of the District of Columbia, which is not a State within the meaning of the Federal Constitution. If Art. IV, Sec. 2, is invoked, it must be because of a right inhering in one by reason of his *State* citizenship, and Manning not being a resident of a State of the Union has no status thereunder.

A State, in the meaning of the Constitution, does not include that District: Hepburn v. Ellzey, 2 Cranch, 455; and the *status* of only a State citizen may be reviewed in this Court as to infringement of the Constitution: Miners' Bank v. Iowa, 12 Howard, 1, cited in Lyon v. Woods, 153 U. S., 661; Scott v. Jones, 5 How., 343.

A citizen of the District of Columbia is not a citizen of a State, within the sense of the Judiciary Act, as to removal of causes: Cameron v. Hodges, 127 U. S., 325; Hooe v. Jamieson, 166 U. S., 395. Or within the meaning of the same Act, Section 25, in respect of the jurisdiction of this Court to review judgments of State Courts: Miners' Bank v. Iowa, *supra*.

The distinction between States and Territories is drawn in this *same article* (Art. IV, U. S. Constitution, Secs. 2 and 3), and privileges and immunities guaranteed only to citizens of States.

(c) *Residence and citizenship that of original contractor.*—If Manning's residence is not shown, then the demand that he transferred to plaintiff in error, Sully, can not have the status of a preferred claim—equality with residents of Tennessee, even though Sully be treated as a *citizen* of the State of New York. It clearly appears from the opinion and decrees of the Tennessee Appellate Courts, that

they construed Act 1877, Ch. 31, Sec. 5, to give priority to the claim of a resident creditor only in event he *affirmatively* showed that the particular claim was created or incurred to or with him, originally; that if a note were executed by the Carnegie Land Company to a resident of Kentucky, and the same were by him endorsed to a resident of Tennessee, the latter would not have priority; conversely, that if the note were executed to a resident of Tennessee and endorsed by him to a resident of Kentucky, the latter would have the *status* of a Tennessee resident-claimant.

This was the contention made by the counsel of Sully in respect of another claimant in the State Courts: Rec. 121, 122.

And the Courts responded, sustaining his contention: "Is the American National Bank, confessedly a resident creditor, entitled to the preference given by the statute with respect to its debts assigned to it by a party *whose residence is not disclosed in the record?* The majority of the Court hold that before this bank is entitled to put this debt on the preferential footing given by the statute, it was its duty to make it *affirmatively appear* that it had not been assigned to it by a non-resident of the State."

So that it matters nothing what was the residence or citizenship of the assignee, Sully. Before he is entitled, under this construction of the statute by the State Courts, to the priority of a resident of Tennessee, or (since *Blake v. McClung*) to the priority of an individual citizen of another State, he must affirmatively show that his assignor had the *status* of a resident of Tennessee, or of a citizen of some State of the Union. This he has failed to do. *Non constat*, the debt on which Manning himself recovered was originally contracted to a non-resident corporation, and transferred to him. The burden was upon this claimant to show the status of the original creditor holding the claim.

A. B. Carhart and Mrs. Mary P. Myton, as general unsecured creditors on certain notes, also failed to comply with the requirement as to the burden of proof.

Wilberforce Sully, it will be noticed, purchased another claim and had it assigned to him—that of W. E. Maiden; and, finding that he could carry the burden of showing a constitutional *status* for his said assignor, did so: Rec. 60, 69.

(d) *Priority to those only whose claims antedate mortgages.*—There was a requirement imposed by the Tennessee Courts, in order to the *status* of a creditor entitled to priority of satisfaction over the mortgages. All creditors alike (residents and non-residents) were postponed who failed to show that their claims were not incurred subsequent to the date of the registration of the mortgages respectively—subsequent to the attaching of the lien of the mortgages.

This rule was likewise contended for in the Courts below by the counsel of the plaintiffs in error: "We take it that it will not be disputed that before a claim can have the *status* of a Tennessee creditor, whose debt was *contracted before the registration of the mortgage*, it must show itself entitled to that *status*—must show its priority": Rec. 122.

The Court responded by a favorable ruling, and even went to the point of disallowing attorneys' fees, validly contracted for, in notes given to creditors prior to mortgage-registration, unless it were shown that the fees were earned prior to the lien of the mortgage: Rec. 72.

None of the plaintiffs in error show either by their pleadings or in proof, that their claims arose prior to the liens of the mortgages or either of them. The last mortgage was registered February 10, 1893. A. B. Carhart avers that as to the note and mortgage bonds pledged as collateral thereto, his claims arose March 1, 1893; Mrs. Myton that her claim arose May 25, 1893; as to the Manning claim, there is no averment or proof to show when it arose.

If these plaintiffs be entitled constitutionally to the *status* of residents of Tennessee under *Blake v. McClung*, then they have failed to show themselves prior in right to the mortgage claimants, or to share defendants' priority, in that they fail

to prove creation of their claims before the registration of the mortgages.

The requirement of the statute and the State Court that claimants should so show the date of creation of their claims, as a condition to their sharing in the assets preferentially, will not be interfered with by this Court: Castillo v. McConnico, 168 U. S., 680, and cases cited.

As we have seen, if plaintiffs in error have not priority over the mortgages, these mortgages, or even the second one, will more than consume the assets before their claims are reached, and the debate becomes a moot one.

Thus, failing to show themselves entitled to share with defendants in error, in that they failed to show that their demands antedated the mortgage lien, every one of these plaintiffs in error must fail of relief. They fail on a question other than a Federal one: Castillo v. McConnico, *supra;* Gillis v. Stinchfield, 159 U. S., 600; Harrison v. Morton, 171 U. S., 47.

The purpose of Art. IV., Sec. 2, "was to declare to the several States that whatever those rights, as you grant or establish them to your citizens, *as you limit or qualify or impose restrictions* on their exercise, the same *neither more nor less*, shall be the measure of the rights of citizens of other States": Slaughterhouse Cases, 16 Wall., 36; Blake v. McClung, 172 U. S., 257.

(e) *Failure to except, appeal and assign errors below.*—All of the plaintiffs in error standing in the right of general unsecured creditors, saving only A. B. Carhart, must also fail on these grounds: (1) They did not except to the master's report postponing their demands to the satisfaction of the mortgages; (2) they did not appeal from the decrees of the Chancery Court at Johnson City, thus postponing them and denying them the status of residents of Tennessee; (3) they did not, in the Appellate Courts of Tennessee, assign errors or cross-errors, challenging the attention of the Courts to their rights, statutory or constitutional—particularly, they failed to raise, in any of

the courts of Tennessee, a Federal question to support their present writ of error. And herein:

(1) In Tennessee the rule of law is that a party who fails to except to a report of the master under a reference, will not after confirmation be heard to complain. The report is conclusive on appeal. Even a minor appellant thus failing will be barred of relief: Grinstead v. Huggins, 13 Lea, 731; Gibson's Tenn. Ch. Prac., Sec. 598. Even though the appeal be a broad one: Owens v. Pearce, 5 Lea, 466.

The Court of Chancery Appeals recites the names of the various exceptants (those appealing and those not appealing) and the names of Mrs. Myton, E. C. Manning or Wilberforce Sully, as his assignee, do not appear: Opinion, Rec. 60.

Had these persons appealed, their appeals would have been ineffectual and dismissed for this reason, and a Federal question would not have availed them.

(2) These two claimants did not except to or appeal from the decrees of the Chancery Court at Johnson City: Rec. 51, 52.

It is contended, however, that inasmuch as A. B. Carhart and others appealed, and, as is further contended, relief ought to have been granted said Carhart where it was denied, this Court will, if it grants Carhart relief, at the same time open the decree of the several Courts of Tennessee so as to grant like relief to Mrs. Myton and Wilberforce Sully as Assignee of E. C. Manning.

(aa) There was no broad appeal except by one party—Travelers' Insurance Company. The appeals of all others were special. The rule in Tennessee is that an appeal by an *antagonistic party*, even though a broad one, will not avail his opponent. Thus, where an appeal is broadly taken by a complainant, and the respondent attempts to have the Supreme Court adjudge in his favor a question that has been decided in the lower court against him, but to correct which adverse adjudication he

did not appeal, it will stand and the Supreme Court will refuse to review it: Shields v. Alsup, 5 Lea, 524; Smith v. Gooch, 9 Lea, 536. Here the plaintiffs in error, who are general creditors, were in direct antagonism to Travelers' Insurance Company. Their claim is that they should have priority over that Company's mortgage along with others.

If it be contended that Mrs. Myton and Sully, assignee of Manning, stand with Travelers' Insurance Company in such a sense as to put them in a class with it, entitled to the relief awarded to it, then Travelers' Insurance Company, being a foreign corporation and not entitled to the protection of Art. IV., Sec. 2, properly failed in reversing the lower court in the Tennessee Appellate Courts, and this non-success would have likewise affected those seeking the benefit of the Company's broad appeal.

The broad appeal of Travelers' Insurance Company would not cure the failure of these persons to except to a report under reference: Long v. Read, 9 Lea, 544; Henderson v. Donovan, 13 Lea, 293.

(bb) But it is argued that Mrs. Myton and Sully, assignee of Manning, stand in the same right with A. B. Carhart, who did appeal to the Tennessee Appellate Courts, and that since Carhart is a non-resident individual, entitled, the argument proceeds, to the protection of Art. IV., Sec. 2, this Court will grant them a like measure of relief, notwithstanding their own failure to except or appeal from the decrees of the Chancery Court. It will be noted that *Carhart's appeal was special*, and in Tennessee a special appeal brings into review only the particular matters specified: Wharton v. Lavender, 12 Lea, 179; Wood v. Cooper, 2 Heisk., 441; Bell v. Horn, 1 Shannon Tenn. Cas., 589; Loftis v. Loftis, 94 Tenn., 237.

It will be further noted that even Carhart so restricted his *appeal* as to carve out any chance to complain that constitutional privileges and immunities had been denied him by the Chancellor: Rec. 50, 51. And in order to make this question, which was an after-thought purely, Carhart prose-

cuted a special writ of error, supplementing his special appeal: Rec. 69. Of course, on writ of error, only the rights of the *plaintiff in error*, particularly referred to in the petition for the writ, are brought into review. Had the Supreme Court of Tennessee granted Carhart his claim to the protection of Art. IV., Sec. 5, it could not under its procedure have granted like relief to one who did not join him in the writ of error, but who acquiesced in the decree rendered below.

(cc) It is not the law in Tennessee that, in event of a broad appeal and grant of relief to the one creditor who appeals, a like measure of relief will inure to a non-appealing creditor against the same estate.

There is a rule in that State that in event there is a broad appeal by one person standing *in the unity of right* as another non-appealing party, the decree will be molded to meet the rights of both as there determined. Thus, a successful broad appeal by one heir will avail a non-appealing heir, *when their common estate is affected:* Allen v. Shanks, 90 Tenn. (6 Pickle), 382. A broad appeal by a dowress will affect and avail her own children, heirs, in respect of a *common estate:* Parsons v. Kinzer, 3 Lea, 352. A broad appeal by one partner will avail a non-appealing partner: Butler v. Kinzie, 90 Tenn. (6 Pickle), 32.

But it will be noted that in all of these cases there appeared a unity or quasi-unity of interests. In the last named case, the Court calls attention to the difference between such joint or mutual interest, and distinct rights: Butler v. Kinzie, *supra*, citing 2 Coldwell, 271.

"The doctrine has never been applied where there are no joint or common interests": Jardon v. Hollister, 2 Coldwell, 271. Thus, in equity causes, where there is a decree against a principal and his surety, and the principal alone appeals, no relief is grantable to the surety: "If the surety wishes the decree reviewed as to himself, he must do so on the same terms as other defendants, by giving bond as required by law": Bottoms v. Leatherman, 3 Legal Rep. (Tenn.), 135;

S. C., 3 Shannon Cas., 269; Briggs v. Hinton, 14 Lea, 236; 4 Baxter, 217; 8 Humph., 489. An appeal by one of two tenants in common and modification in his behalf, does not avail the non-appealing tenant: Morgan v. Hannah, 1 Shannon Cas., 28; S. C., Thomp. Tenn. Cas., 44; Reeves v. Murphy, 1 Shannon Cas., 424.

And the Tennessee Court has decided the exact point here made by said plaintiffs in error against them: Where two distinct creditors file a bill in equity against the administrator of a decedent for recoveries and an accounting as to decedent's personal estate, which bill is dismissed as to one of said complainant creditors, but sustained as to the other; and where the latter, unsuccessful, creditor alone appeals, it was held that "the demands of complainants were unconnected with each other, upon which separate suits might have been brought; each complainant stands on his own right of action. And this is so even in the incidental *matter of account*, as much so as if the bill had been filed by one of them *for himself and other creditors*, and the other had *come in by petition*, and had himself made a party": Cooper v. Lyon, 9 Lea, 600.

Therefore, the appeal of Carhart, had it been a broad one, would not have availed the other plaintiffs in error, who intervened by petition on distinct causes of action.

Where the parties interested in the allowance of an amount made by the master have not appealed from the decree of confirmation, the allowance must stand. The rule is common to this Court and the Courts of Tennessee: Goodwin v. Fox, 129 U. S., 601; Cleary v. Foundry Co., 132 U. S., 612; U. S. v. Blackfeather, 155 U. S, 311.

In the Appellate Court a party not appealing cannot take advantage of an error in the decree committed against himself; if he desires to avail himself of such error, he should take a cross-appeal, failing in which he admits the correctness of the decree as to him: Chittenden v. Brewster, 2 Wallace, 199; Loudon v. Shelby Co., 104 U. S., 778.

Had these rights been reviewable in the Supreme Court, that court demands specific assignments of error by any person asking relief, and the record shows that neither of these plaintiffs assigned errors there: 86 Tenn., 37, 500; 89 Tenn., 775 (rules same as this Court's).

Had they assigned errors, the rule of that Court is that they would not be considered where a question is thereby raised that was not made in the pleadings or noticed in proof, in the court below: Stainback v. Junk, 98 Tenn., 306.

Furthermore, the effect of the existence of an intermediate Appellate Court in Tennessee must be considered. Where no appeal is prayed by a defendant from an appeal of the Chancellor, and no point is made in the Court of Chancery Appeals upon the rights of such defendant, the Supreme Court of Tennessee will decline to review his rights, even though he appeals from the decree of the Court of Chancery Appeals. In the case at bar, Mrs. Myton and Manning's assignee failed to appeal from the decree of the Court of Chancery Appeals as well as from that of the Chancellor: Pile v. McCoy, 99 Tenn. (15 Pickle), 367.

(3) The said two plaintiffs did not at any time in the Courts of Tennessee, raise the Federal question (violation of Art. IV., Sec. 2, of the Constitution,) relied upon here to reverse their decrees.

This is conceded by counsel for said plaintiffs in error, who claim, however, that the raising of that Federal question by their co-plaintiff in error will inure to their benefit.

No intendments are indulged respecting the raising of a Federal question below. It should *unmistakably* appear that the question was *properly* raised in the State Court: Brown v. Colorado, 106 U. S., 97.

The attention of the court below must not only be called to the particular clause of the Constitution, but also to the *right plaintiff in error* claims under it: Forney v. Towle, 1 Black, 350. The Federal right must be *personal* to the plaintiff in error: Missouri v. Andrews, 138 U. S. 497. The

right must be claimed by each person for *himself*, not for another: Hale v. Gaines, 22 Wall, 161; Miller v. Bank, 106 U. S. 542, and cases cited; Long v. Converse, 91 U. S. 105. When raised by a defendant in error, it cannot avail a plaintiff in error: Manning v. French, 133 U. S. 190. What if the question raised by Carhart had been decided by the State Court in his favor, would Mrs. Myton have *status* here, and the Court jurisdiction? Manning v. French, *supra*. It appears that Travelers' Insurance Company undertook for itself to raise the Federal right under Art. IV, Sec. 2. It is clear that it has no *status* under that clause of the Constitution; (Blake v. McClung, 172 U. S. 250). Had Travelers' Insurance Company and Mrs. Myton been the only plaintiffs in error, and had the Insurance Company thus failed, would Mrs. Myton have *status*, and the Court jurisdiction?

The Insurance Company raised its own Federal question, that of privileges and immunities of State citizenship; whereas, its only *argument in this Court* is directed to rights under the Fourteenth Amendment. *Non constat*, had Mrs. Myton raised a Federal question, it would have been denial of process of law under Fourteenth Amendment. Will the Court impute to Mrs. Myton a better record as to the raising of a Federal question, than has been made by diligent and able counsel for the Insurance Company for it?

This Court has put the point thus: "Under what clause of the Constitution did plaintiff in error make his claim? The record does not show. For aught that appears in the record, some other clause in the Constitution may have been relied upon, etc. The clause should have been specified by plaintiff in error in the State Court, in order that this Court might see what was the right denied them:" Maxwell v. Newbold, 18 How. 516.

If these two plaintiffs in error are assumed to have raised the Federal question, will this Court also assume that the Supreme Court of Tennessee would not have precluded them on other valid grounds? Their demands were not fought in that Court since it was immaterial, in the then

condition of the record, whether Manning's claim was $46.00 or $46,000.00—it did not reach to actual recovery. There were, in fact, valid defenses to said claim, that would have been urged had it claimed any *status* other than the one given it.

It thus appears that these two appellants, without excepting to a report of the master, without excepting to the decree of confirmation, without praying an appeal therefrom, without assigning errors to call attention to their supposed rights, without excepting to the decree of the Court of Chancery Appeals, without appealing therefrom, without assigning errors in the Supreme Court, and without so much as saving exception to the decree of that Court, ask this Court to decree them rights they never thought of asserting, until *after* the ruling of this Court in *Blake v. McClung*, 172 U. S. 250.

If any of these questions of State procedure or law are determinable against these plaintiffs, this Court will not assume jurisdiction: Klinger v. Missouri, 13 Wall. 257.

II. FOREIGN CORPORATION NOT ENTITLED TO PRIVILEGES AND IMMUNITIES IN QUESTION.—The Travelers' Insurance Company, it is clear, has not a *status* as a general creditor to share with Tennessee residents on terms of equality: Blake v. McClung, 172 U. S. 251.

B.—RIGHTS OF MORTGAGEES.

I. UNDER ART. 4, SEC. 2, U. S. CONSTITUTION.—It appears that one of the mortgagees, A. B. Carhart, is a non-resident individual. If it should be held against our contention—*ante* A.—I (a)—that he is, upon this record, also a *citizen of New York*, we shall have next to consider whether said Carhart has been denied a privilege or immunity, inhering in such citizenship, by that portion of Tenn. Act 1877, Ch. 31, Sec. 5, which provides that the lien of mortgages shall be subject to certain debts against the mortgagor.

The argument is that the lien of a mortgage if taken by a resident of Tennessee is not subjected to such priorities, and that the mortgage if taken by a citizen of another State is made so subject; that, therefore, the resident citizen of Tennessee is granted an immunity which must likewise be granted to a citizen of the State of New York.

(a) The fallacy affecting this argument is in the assumption that there is any discrimination as to rights claimed under mortgages held by citizens and non-citizens of Tennessee. The language of the statute is: "Nevertheless, creditors who may be residents of this State shall have priority in the distribution of assets, or subjection of same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors," for all debts made or owing by the corporation previous to the registration of such mortgage or rendition of such judgment.

This language shows that the lien of a mortgage, whether executed to secure a Tennessee or a New York creditor, shall be subject to certain previously contracted debts. It will be noticed that the clause, "being residents of any other country or countries," succeeds and qualifies "simple contract creditors," and not "mortgage or judgment creditors;" that the Act does not read "*such* mortgage or judgment creditors," or "mortgage or judgment creditors so residing." The statute as written gives to residents of Tennessee priority over *all* mortgages the liens of which after-attach.

Every rule of statutory construction will compel that holding, it would seem. And herein—

(1) "Primarily, a statute is to be interpreted according to the proper grammatical effect of the arrangement of the words in the act. Qualifying phrases should be confined to their next antecedent, in the absence of punctuation showing a different intent." By this test all mortgages are subjected.

(2) There are presumptions, in the construction of statutes, against their being instruments of injustice, against a construction that would work inconvenience or absurdity in its practical operation. These presumptions are common to the Tennessee Courts and this Court: U. S. v. Kirby, 7 Wallace, 482; Oates v. Bank, 100 U. S., 239; Washington, etc., Co. v. Company, 160 U. S. 354; Railroad v. Horne, 1 Coldwell (Tenn.) 77.

(a) It needs no argument to show that a construction that would subject the lien of all mortgages alike, would be more consonant with justice.

(b) The construction contended for by these defendants in error is the only one that would not make the statute work absurd results and great inconvenience in enforcement. Let us assume that the $300,000.00 of bonds secured by the blanket mortgage to Wilberforce Sully, Trustee, registered Feb. 10, 1893, had been placed in the hands of financial agents in New York for sale by subscription, and had been purchased by residents and citizens of all the States and by aliens in London. Now, let us assume (as plaintiffs in error contend) that a citizen of Tennessee purchasing and holding one of the bonds is entitled in respect of it to the lien of the mortgage without subjection to previously created claims, while a citizen of Kentucky, as a holder of like bond, is not. The bonds are made payable to bearer. They pass in open market into many hands; they bear no indorsements to indicate the first holder—who is entitled or not (as his residence may have been) to the enforcement of the lien of the mortgage without subjection. The legislature will be taken to have known the probable methods and results of such a bond issue, and the inconveniences and absurdities attending an attempt to protect a resident of the State claiming, as a bondholder under such mortgage, priority over other bondholders and antecedent creditors.

Again, all mortgages secure bonds *equally and without preference.* It is not to be presumed that the statute

intended to disturb the ordinarily understood rights, and customs obtaining in the financial world, further than its terms necessarily compel.

(3) Kindred Acts of the same State may be looked to, as an aid to construction.

In 1873 the Legislature of Tennessee subordinated railway mortgages to certain claims against the mortgagor company, on causes of action antedating and postdating the lien of such mortgages, but Tennessee mortgagees were not excepted: Act 1873, Ch. 8.

In 1877, the same Legislature that passed the Act now in question, enacted another statute which provided that no railway company should create a mortgage on its property in Tennessee that should be valid as against judgments for materials furnished and damages done in the operation of the road, but all mortgagees were alike affected: Act 1877, Ch. 12.

(4) Both this Court and the Tennessee Court adopt the rule that one of two possible constructions of a statute will be adopted which will uphold it as constitutional. The presumption in favor of constitutionality obtains even *against* the more natural interpretation of the language used: Presser v. Illinois, 116 U. S., 252; Hooper v. California, 155 U. S. 657; Cole v. Mfg. Co., 90 Tenn., 466; Dugger v. Ins. Co., 95 Tenn., 245.

The construction contended for by defendants in error is the more obvious one, and in addition saves the Act from unconstitutionality.

(b) But counsel of plaintiffs in error argue that to place a construction on Act 1877, Ch. 31, Sec. 5, that would subject the mortgage lien of a resident or citizen of Tennessee, would be to make the statute work an absurd result. They say: "The proposition is, that a Tennessee creditor who has no judgment and no mortgage, shares with all other Tennessee creditors until the former takes judgment or mortgage, and by that act he loses his right to share with Tennessee creditors, and instead of getting a benefit by

his diligence,in case of subsequent insolvency, he not only loses the lien of his judgment or mortgage as to all debts contracted to Tennessee creditors before the registration or rendition, *but in addition loses the right that he formerly had as a general (unsecured) creditor.*"

Counsel have overlooked or misconceived the record and rulings of the State Courts to the effect that the statute only means to subordinate the lien of the mortgage or judgment—not to disturb the rights of the creditor who takes the mortgage or judgment as they stood antecedent to the attaching of the lien thereof. Such rights of such creditors are *not lost to them.* The statute was construed by the State Courts to grant the "prior lien" of the mortgage or judgment "against all debts which may be incurred subsequent thereto," but to deny such *priority of lien* only (and not the *debt* in its original *status*) to either mortgages or judgments, as respects antecedent debts.

And this was the application actually made by the Courts to the rights of parties. Thus: H. C. Jarvis, a resident of Tennessee, recovered a judgment against the insolvent Carnegie Land Company, and notwithstanding he thus became a "judgment creditor," he did not, on that account, lose his rights as they stood at the date his "debt was made." That claimant was given no *priority by reason of his judgment;* and he was forced back to his *status* and rights as they stood before his judgment was taken, the Court saying: "The real difficulty in connection with this claim is over the contention whether the claim should be treated as a debt as of the date of his decree, *or as of the date of his right to recover.* Manifestly, his right of action existed long before the Land Company placed any mortgage upon its properties:" Rec. 80, 81.

Frame King, a non-resident of Tennessee, standing in the right of Jas. H. Preas, a resident of Tennessee, notwithstanding the claim was reduced to judgment, was permitted to share in the assets. He did not lose his *status* of general unsecured creditor in becoming a judgment creditor; but

he was not granted any priority on account of his judgment. The Court adjudged: "The Court of Chancery Appeals was in error in depriving Jas. H. Preas of the right to share in the assets to the extent of his payments, with interest, on his suretyship for the Carnegie Land Company to Frame King, such payments *to be prorated upon as of date of suretyship, Dec.* 23, 1891,"—not as of date of the judgment: Decree Supreme Court, Rec. 88; date of judgment June 8, 1893, Rec. 82.

Wilberforce Sully, as assignee of W. E. Maiden and wife, Sully a non-resident standing in the right of his assignors, was placed in the class of Tennessee creditors entitled to priority, notwithstanding judgment had been taken on the claim; but the intervenors were remitted to the *status* the claim had on date of its creation, and were granted no priority because of the judgment.

Nowhere in the record does it appear that a Tennessee resident was granted any privilege or immunity because of a judgment taken or mortgage held by him. On the contrary, they have been forced in every instance to proof and position of original *status* of the particular claim.

The contention of, and construction of the statute by, plaintiffs in error, if correct, would grant to a resident of Tennessee who has reduced to judgment a demand of a corporation of Virginia, contracted with it but transferred to such Tennessean (thus becoming a "judgment creditor") over residents of Tennessee. However, the contrary of this was held by the State Courts in respect of several claims; e. g., Carnegie Iron Co., a foreign corporation, claim assigned to A. R. Wing, a resident of Tennessee, who took judgment thereon, but was denied right of priority: Rec. 73, 74.

Therefore, the actual construction placed on the Act being contrary to the contention of the plaintiffs in error, this Court will not undertake to reconstrue the Act or adopt another construction of this State statute: Missouri Ry.

v. Nebraska, 164 U. S 414; and cases cited; Phoenix Ins. Co. v. Gardner, 11 Wall. 204.

Under this construction by the State Court, if Carhart has, to the Court's satisfaction, shown himself to be a *citizen* of New York, he is as such entitled to share with residents of Tennessee, as a *general unsecured creditor*, in the priority over his own mortgage, *provided* he can show that his debt from the Carnegie Land Company was created before, and not after, the attaching of the mortgage lien. If he had rights before the registration, as a general creditor, they were not lost to him by the lien of the mortgage. He only loses the right to assert that *lien* (not his debt so contracted) as against antecedent creditors, residents of Tennessee, and non-resident individuals (*Blake v. McClung*) But Carhart shows on the face of his pleading that his claim arose March 1, 1893, by note, to which he took the mortgage bonds as collateral security. He thus fails to bring his debt within the antecedent class: *Ante* A.—I (d). On the same facts a resident of Tennessee would have been postponed in like manner, and, in fact, were so postponed.

(c) Opposing counsel do not undertake to state or argue that the State Court, having resident mortgagees and non-resident mortgagees before it in contest, denied privileges and immunities to the latter, while granting them to the former; as was the case in *Blake v McClung*, *supra*. The argument, rather, is that the statute is *subject to a construction* that would cause discrimination between resident and non-resident mortgagees, against the latter; not that the statute was so construed and enforced.

The question thus made is a moot one. It will be time enough to pass upon the discrimination when it occurs—not by way of hypothetical assumption that, had there been Tennessee mortgagees before the State Court they might, under one of two constructions of the statute, be granted the immunity in question. This Court will decide such constitutional questions only as the necessity arises: Baker v. Grice, 169 U. S., 292.

"Because a State statute might be construed so as to cause it to violate the Constitution of the United States, is not sufficient to raise a Federal question; but the right of the plaintiff in error is limited to the enquiry whether, in the case presented, the statute is so applied as to deprive him of his constitutional right:" Castillo v. McConnico, 168 U. S. 680; Phoenix Ins. Co. v. Gardner, 11 Wall. 204.

(d) The Travelers' Insurance Company being a corporation, is not entitled to relief under Art. IV, Sec. 2, *as a mortgagee*, even if A. B. Carhart, as a citizen mortgagee, is entitled to the protection of that clause of the Constitution: Blake v. McClung, 172 U. S. 250.

(e) If Carhart, standing on the lien of his mortgage of Feb. 10, 1893, is declared by this Court entitled, under Art. IV, Sec. 2, U. S. Constitution, to have been denied privileges and immunities granted to citizens of Tennessee; and, in addition, it be held that residents of Tennessee have, as just indicated, a constitutional priority over the mortgage of Travelers' Insurance Company of Nov. 23, 1891, then it must follow that residents of Tennessee have contractual (not statutory) priority over Carhart's mortgage, as to the Hotel Carnegie property, in this:

The statute constitutionally makes the first mortgage subject to residents of Tennessee and non-resident individual citizens: Blake v. McClung, *supra*. When Travelers' Insurance Company took that mortgage it did so with knowledge, and with an *implied contract* imposed upon it by law (Provident Institution v. Jersey City, 113 U. S. 515,) to take subject to the preferred class.

When the mortgage to Wiberforce Sully, Trustee, was executed on Feb. 10, 1893, it was on its face expressly *made subject* to the mortgage securing Travelers' Insurance Company. Sully, Trustee, and Carhart, bondholder, are therefore estopped to say that the first mortgage is in anywise invalid: Bronson v. Railway, 2 Wall. 283; Jerome v. McCarter, 94 U S. 734.

If B. takes subject (by way of statute and implied contract) to A., and C. take subject (by express contract) to B., then A. has priority over C. If C., by reason of a mortgage lien, receive the $25,000.00, the products of the twice-mortgaged property, he cannot hold same as against B.; neither can B. hold as against A. It will be noted that if C. recovers it will be by reason of the *lien of his mortgage*, and this he has voluntarily subjected to B's rights. The decree of the State Court is as to said property maintainable on this ground, even if Carhart's full contention under Art. IV, Sec. 2, in respect of his mortgage, be conceded him. If such constitutional right is here decreed to Carhart, as mortgagee, the Court is asked to indicate how far that would disturb this rule of general jurisprudence, as relating to decrees renderable by the State Supreme Court.

II.—UNDER FOURTEENTH AMENDMENT TO U. S. CONSTITUTION.—Certain of the plaintiffs in error, Wilberforce Sully, Trustee, A. B. Carhart and Travelers' Insurance Company assigns as error that they were denied by the State Court the protection of the Fourteenth Amendment.

(a) *Equal protection of the laws.*—Neither of these plaintiffs in error was a person "within the jurisdiction" of Tennessee, so that they were not denied the protection of that clause of the Amendment which guarantees the equal protection of the laws: Blake v. McClung, *supra*. And such right is not asserted in argument.

(b) *Due process of law.*—But the insistence is, that due process of law has been denied them.

It would seem that this question was settled against plaintiffs in error by this Court in *Blake v. McClung*, *supra*. There it appeared that under this same Act of 1877, Ch. 31, a citizen of Virginia, within the meaning of this clause, was denied the right to participate upon terms of equality with residents of Tennessee in the distribution of assets of a foreign corporation doing business in Tennessee. The contention there made by such citizen of Virginia was that he was

denied due process of law, in that he was denied by the Act the right to proceed to judgment, execution, and satisfaction, or to intervention, on terms of equality with Tennesseans. The contention here is that the plaintiffs in error were deprived of obtaining *mortgage security* for indebtedness without submitting to the same priority. In both cases, in the last analysis, the thing complained of is subjection to a preference in behalf of a class. In the one case, the denial was of the right to take mortgage without this condition; in the other the denial was of the right to obtain for a debt in existence satisfaction or security by the usual processes of law. In neither case can it be said that the respective plaintiffs in error were *deprived* of their property: Blake v. McClung, *supra.*

Plaintiffs in error argue that under the Act their mortgages were permitted to become first liens, and that such first liens were "taken away by the accidental happening of an unforseen contingency, not contracted for—insolvency." It is a mistaken assumption that plaintiffs ever had priority of right over the defendants in error by reason of their mortgages, or that the character of their liens ever changed. It is true that they had *liens* on the property, but those liens were *in and from their inception* subject to the statutory priority. This priority was not so much a lien as a preference, and may be likened to preferences or priorities of United States, States, partnership creditors over individual creditors, claims of the character shown in Frazier v. Railway, *post*, Provident Institution v. Jersey City, *post.*

Furthermore, this subjection of the mortgage liens is not confined necessarily, though it be applicable usually, to administration of corporate assets in insolvency; but this preference may take place in "the subjection of any part of the assets;" very much as intervene the rights of firm creditors in event a levy is made on firm assets by a creditor of one of the members of the firm.

If the question is to be debated anew, then there are numerous cases holding that on the facts here appearing, the mortgagees were not denied due process of law.

(1) *As to power to restrict right to contract.*—Each State has the power by general laws to regulate the conveyance and disposition of all property, real and personal, within its jurisdiction; Brown v. Smart, 145 U. S. 454; U. S. v. Fox, 94 U. S. 315.

The right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State without violating this amendment: St. Louis Railway v. Paul, 173 U. S. 404; Orient Ins. Co. v. Daggs, 172 U. S. 562.

The right of a State to deny to corporations the right to mortgage their property or to regulate the exercise, is undoubted: 3 Cook., Corp. Sec. 859; Jones, Mort. Sec. 124.

And equally clear is the right by statute to prescribe that a mortgage, if so executed, shall carry rights which shall be subordinate to those of a preferred class. Thus a provision subordinating a corporate mortgage to after-arising claims for labor and material, etc., are valid: Brooks v. Ry. 101 U. S. 443; Gilchrist v. Helena Ry. 58 Fed. Rep. 708; 2 Jones, Liens, Sec. 1628; Central Trust Co. v. Sloan, 23 Am. & Eng. R. Cas., 398.

And the priority need not be to laborers or material men who preserve or add to the value of the mortgage premises, as adverse counsel contend. Thus, injuries to persons or property of others may constitutionally be made superior even to a *previous* mortgage: Central Trust Co. v. Sloan, *ante;* Frazier v. Ry. Co., 88 Tenn., 160, affirmed by this Court, 139 U. S. 288, involving Act 1877, Ch. 12, mentioned above, and involving a claim that in nowise affected the preservation or increase of the mortgage property.

This Court has also held that the Legislature may validly enact that the lien of a mortgage upon realty, executed after the Act, shall be subordinate to a charge for water rents made by the Act a preferred claim upon the realty; and such Act is not in contravention of the Fourteenth Amendment, even though the State Court construe such water rents not to be valid as taxes or as special assessments, but

upholds same as against the mortgage lien on the ground that the mortgagee had taken its mortgage impliedly assenting or contracting with reference to the law governing water rents. The Court said: "The mortgagee chose to take its mortgage subject to this law; and it is idle to contend that a postponement of its lien to that of water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction:" Provident Institution v. Jersey City, 113 U. S. 515.

Bondholders under such a mortgage take their securities with notice of, and subject to, the Act, also with notice of the *status* of a company coming in thereunder: McCormick v. Bank, 165 U. S. 538; Edwards v. Kearzey, 96 U. S. 595, 601; 3 Cook, Corp. Sec. 859; Va. Development Co. v. Crozier, 90 Va. 126; S. C. 44 Am. St. Rep. 893.

The case at bar is only made stronger by the fact that the mortgagor was a foreign corporation, relieved by this Act from the penalties of alienage as to its estate, on condition that its property should stand in the first instance as security for a preferred class.

(2) *As to arbitrary class legislation.* —The further contention is made that the Act is obnoxious to the objection that it creates an arbitrary class.

(a) The arbitrary class, according to the argument, is not the *preferred* class—residents of Tennessee. Indeed, when that class was not enlarged by the entry into it of non-resident individual citizens, the Act was not held to be in contravention of Fourteenth Amendment: Blake v. McClung, *supra*. Thus enlarged to include statal citizens, it cannot contravene that Amendment.

(b) The arbitrary class created is said to arise in the segregation of foreign corporations engaged in mining and manufacturing from all other foreign corporations, and the regulation of their estates, by this rule of priority, while other foreign corporations escape.

1. Classification is not forbidden by this Amendment; the Legislature may distinguish, select and classify, and necessarily the power must have a wide range of discretion, and the classification is not reviewable unless palpably arbitrary: Orient Ins. Co. v. Daggs, *supra*, and cases cited. This Court has said that whether the classification is the best that could have been made is not for it to decide. Its province is only to determine whether it could be done at all, and under any circumstances. The Legislature is presumed to have known the conditions prevailing in its State: Dow v. Beidleman, 125 U. S. 680. The Amendment does not prohibit legislation limited to objects to which it is directed, by territory, as cities from country districts: Hayes v. Missouri, 120 U. S. 68; regulation of warehouses in one city: Munn v. Illinois, 94 U. S. 113; regulation of passenger elevators confined to large cities: Budd v. N. Y., 143 U. S. 517.

And may validly classify thus: Express companies may be included, while railway companies carrying express are excluded: Ex. Co. v. Seibert, 142 U. S., 339; sales made on 'change included and other sales excluded: Nicolls v. Ames, 173 U. S. 521; foreign from domestic corporations: Fire Asso. v. N. Y., 119 U. S. 115; Pembina Co. v. Pa., 125 U. S. 653; A's business from B's where they are of distinct character: Magoun v. Bank, 170 U. S. 283; as between different users of steam power, in respect of fires: Ry. v. Mathews, 165 U. S. 25; as between plaintiff and defendant in respect of attorney's fees: Atcheson Co. v. Mathews, 174 U. S. 913; holdings of land above from those under a certain acreage: King v. Mullins, 171 U. S. 435; one turnpike from others: Covington Co. v. Sanford, 164 U. S. 590; railways of less than fifty miles length from those above: Ry. v. N. Y., 165 U. S. 630.

2. The argument was directed in the case of *Blake v. McClung* to the point of arbitrary class legislation. Counsel for plaintiffs there, said in written argument: "It is true, as a general proposition, that it is not within the Fourteenth Amendment to with-

hold from the States the power of classification, and if that the laws enacted by State legislatures deal alike with all of a certain class they are not obnoxious to the charge of denial of equal protection, and yet it is equally true that such classification cannot be made arbitrarily:" Record in Blake v. McClung, 16141, Argument, p. 28. But the Act was held not to contravene the Fourteenth Amendment: 172 U. S. 260.

At the same term of this Court the exact question was also decided in the case of Orient Ins. Co. v. Daggs, 172 U. S., 562, wherein it was determined that the classification is not arbitrary where foreign fire insurance companies had certain burdens imposed upon them, not applied to other insurance companies.

3. Many reasons may be given why the classification of foreign corporations engaged in mining and manufacturing may be made to exclude foreign insurance companies, foreign railroad companies, etc. Insurance companies have practically no assets in the State; therefore, the Legislature may deem it proper to force them for the security of its residents to import assets, so to speak, in the form of deposit of securities as a condition precedent to the right of transacting business. A foreign railroad company has the most tangible and enduring asset in its road-bed, bridges, depots, etc., and no condition whatever may be thought necessary as to it. The Legislature may well deem assets of mining and manufacturing companies to be less enduring; their products peculiarly subject to be shipped out of the State; their existence as going concerns more speculative, and manipulation more likely in their affairs.

The facts of this case furnish the very strongest vindication of the justness of the legislative policy exhibited in the Act. The office of the Treasurer of Carnegie Land Company was in New York, and its accounts and funds and securities were subject to be kept there. Residents of the State may be deemed not to have had a fair chance of gaining knowledge of the financial condition of a corporation to

which they were lending credit, and which, by their credit, they were building up. The stockholders' meetings were, of necessity, held out of the State; and if a mortgage bond issue were purposed, it may well have been thought, residents of Tennessee were not on equal terms with those of Virginia, where it was competent for the Legislature of that State to have forced publicity of such purpose by advertisement in advance of meeting. In event of insolvency of the Carnegie Land Company, it was competent for the Courts of Virginia to draw into administration there all the assets of this Land Company not found in Tennessee, and in so doing to give priority to creditors holding sealed evidences of indebtedness over those who did not, whereas, seals are abolished in Tennessee, and its residents would thus by indirection be left unprotected. If the stock of the Company were "watered," the jurisdiction, it has been repeatedly held, is solely with the forum of the corporation's domicile to *found administration* for the purpose of calling the stock for the satisfaction of creditors; and calls are made or not, as the laws of Virginia, and not Tennessee, may decide.

In the case at bar, upon the authority of a stockholders meeting of the Land Company, held in Virginia, a blanket mortgage securing $300,000.00 of bonds was placed upon the property of the Company; the bonds went into the hands of the Treasurer in New York; $85,000.00 of the bonds were by him pledged as collateral security for a note of $14,000.00 to A. B. Carhart, and for a note of $10,000.00 to Mrs. Myton—both being kinspeople of the Treasurer. The bonds were sold by the pledgees and bid in by themselves at the aggregate price of $13,000.00—the bonds, therefore, cost their present holders about fourteen cents on the dollar. It is claimed that they avail to bring to their holder the entire proceeds of the property of the insolvent Company. It appears that even the Secretary of the Carnegie Land Company, a resident of Johnson City, Tenn., was ignorant of all happenings after the bonds were executed, so that when he made up the schedule of the assets for general assignment purposes, he reported $300,000.00 of

bonds, the entire issue, *in the Treasury of the Company at New York.*

If Tennessee officials of the Company were ignorant to this extent, what must have been the plight of an ordinary Tennessee creditor? It is just and equitable for the Legislature to provide against the various forms of corporate manipulation, and for the protection of those who, in the inception of an enterprise, grant it credit, and sell it property that makes possible a mortgage. In the case at bar, if the mortgage plaintiffs in error prevail in this Court, they will receive the proceeds of sale of lands that were purchased of one of defendants in error and not paid for; carpets purchased of another defendant that were not paid for; furniture purchased of another defendant but not paid for; crockery purchased of another defendant but not paid for, etc. It surely is competent for a legislature to prescribe that any mortgage on such property shall be subject to antecedent rights.

4. It is argued in behalf of plaintiffs in error that although the Act may impose notice upon the mortgagee that he must take subject to antecedent debts, yet that the mortgage must really take in ignorance of the number and amount of such debts. We reply that he has a resort to the books of account of the corporation and to all sources of information the mercantile world affords as to *past* transactions. Defendants in error may, with greater force, argue that, without this statutory provision, they would be still more lacking in notice, and without ability to learn, of the execution of a mortgage, which at the time of their debts' creation may be in contemplation, but as to which no record may exist, the execution of the mortgage being in *futurity*.

(3) *Act* 1891, *Chap.* 122, *enlarged the class.*— Prior to the execution of either of the mortgages, to-wit: on March 26, 1891, the Legislature of Tennessee passed an act amending Act 1877, Ch. 31, so as to make it apply to *all* foreign corporations. Only mining and manufacturing corpo-

rations had been subject to these terms prior to that date; land companies were first affected, it would seem, unless perhaps their charters gave them manufacturing and mining powers, by Act 1891. The charter of the Carnegie Land Company is not shown so that its powers may be seen; but it incidentally appears that it had not manufacturing powers. When it was thought that the erection of an iron furnace would add to the value of its "boom" town-site, the Land Company did not assume to erect it under its own charter, but instead promoted the creation of a manufacturing company, the Carnegie Iron Company, for that purpose: Rec. 74.

At any rate the mortgagees cannot complain that class legislation as respects the Carnegie Land Company existed at the date their mortgages were executed.

(c) *Questions peculiar to Travelers' Insurance Company.*—(1) It appears that Travelers' Insurance Company did not, in the State Court, assign an error raising specifically any right in it under the Fourteenth Amendment. It did undertake to raise questions as to its rights under the Federal Constitution, but limited such rights to those guaranteed by Art. IV, Sec. 2: Rec. 92.

It is furthermore true that the State Court did not consider or discuss the rights of Travelers' Insurance Company to due process of law. All that appears, by fairest inference, is that it claimed privileges and immunities of statal and national citizenship, respecting both of which it is not a "citizen."

May, then, the Travelers' Insurance Company show jurisdiction in this Court to review the decree of the State Court as respects *its* right to *due process of law*, by showing that the State Courts passed upon the rights of A. B. Carhart to due process of law?

(aa) It is argued that the question of denial of due process of law was necessarily passed upon by the State Courts. It is replied that the right to raise this particular question was optional with the Insurance Company,

and waivable by it. It was clearly waived when that company assigned error under another clause of the Constitution; stood by and saw another party raise *this* question and exercised its judgment and option not to rely upon it, or to amend its assignment of errors so as to do so. May not a party make his own record and exclude from the State Courts' consideration any such question?

(bb) It is also argued that because Carhart raised this Federal question, the benefit of his doing so inures to the Insurance Company. The argument made, *ante* A–I (e) , is repeated in refutation. The Insurance Company hotly contested the mortgage claim of Carhart. Carhart raised this question under a writ of error, which carried up his rights alone. This Court, in a like condition of record, declined in *Blake v. McClung* to review the rights of parties who did not join in the writ of error: 172 U. S., 261. The State Court did the same thing.

The doctrine of substitutional raising of a Federal question, it is conceived, will not approve itself to this Court. *Quere:* Assume that Carhart, and not the Insurance Company, had been granted relief under his writ of error to the State Court on the ground of denial of due process, and that the Insurance Company had alone prosecuted the present writ. Would its doctrine of the substitutional raising of the question avail here? What if the Insurance Co., only, had raised the question of immunities of Statal citizens, and that Carhart, alone, had prosecuted this writ of error?

(2) It further appears that the trustee in the trust deed, securing Travelers' Insurance Company, in which trustee was lodged the legal title to the property, was made a party to the cause by the Travelers' Insurance Company: Rec. 35; and appeared with the Insurance Company defending against the mortgage of Carhart: Rec. 32.

The trustee has not joined in the writ of error, nor has severance been had as to it. Under all the authorities, it is

a necessary party to the record: O'Hara v. McConnell, 93 U. S., 154. Travelers' Insurance Company stands here alone asserting a right touching deprivation of property—that relates to the title if to anything—a right that belongs to the trustee. Not having joined it in the writ, or severed as to it, no relief is grantable: Garland's Fed. Prac., Sec. 332, 333; May. S. C. Prac., 552; it would seem to any party.

(d) If Carhart, but not Travelers' Insurance Company, is entitled to relief because of denial of due process of law, the insistence made above (B) (1) (c) is here repeated.

SAM'L C. WILLIAMS,
Solicitor.

JOHN H. BOWMAN,
Of Counsel.

SULLY *v.* AMERICAN NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 266 of October Term, 1899. Submitted October 9, 1900.—Decided October 22, 1900.

For reasons stated in the opinion of the court a motion to retax costs in this case is granted and the costs modified accordingly.

THIS was a motion to retax the costs in this case.

Mr. Samuel C. Williams for the motion.

Mr. R. E. Mountcastle opposing.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is in substance a motion to retax costs in this case.

Upon the day of the final adjournment of the court, May 28, 1900, the cause was decided, and a decree entered reversing the judgment of the Supreme Court of Tennessee as to the plaintiff in error Carhart, who was one of several plaintiffs in error, with costs to be paid by the American National Bank. Subsequently to the adjournment all the costs of this court were taxed against the bank, which now prays for a retaxation.

The decree of this court has been misinterpreted. It does not mean that all the costs in this court are to be paid by the bank, but only the costs of the plaintiff in error Carhart, in regard to whom alone the judgment of the court below was reversed.

The motion to retax the costs is granted, and the taxation modified to that extent.

Mr. E. J. Baxter for the motion.

Mr. R. E. L. Mountcastle opposing.

Mr. Samuel C. Williams opposing.